17163
116

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 50.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES FOR THE BENEFIT OF FRANK P. BARTLETT.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

FILED JULY 8, 1913.

(22,788)

(22,788)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 50.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES FOR THE BENEFIT OF FRANK P. BARTLETT.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

INDEX.

	Original.	Print
Caption	*a*	1
Transcript from the circuit court of the United States for the southern district of New York	1	1
Writ of error	1	1
Clerk's certificate	2	2
Summons	3	2
Complaint	4	3
Amended answer	8	5
Contractor's bond	15	9
Specifications	20	12
Articles of agreement	37	21
Extract from the minutes of trial	44	25
Order to set aside verdict as to interest	45	25
Judgment	46	26
Order directing judgment issue against both defendants	48	27
Bill of exceptions	50	27
Testimony of Frank P. Bartlett	52	28
Alexander Toffi	86	45
John R. Geary	111	59

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 15, 1913

	Original.	Print
Testimony of John F. Donovan	118	63
John E. Irwin	158	84
Frank P. Bartlett (recalled)	160	85
Anson M. Bangs	164	87
John F. Donovan (recalled)	166	89
Motion to direct verdict renewed	170	91
Charge	170	91
Requests to charge, &c	177	95
Judge's certificate to bill of exceptions	185	99
Stipulation as to bill of exceptions	186	99
Stipulation as to exhibits	187	100
Plaintiff's Exhibit A—Book of board bills	188	101
7—Slip—Deductions from store account	193	106
8—Slip—Deductions from store account	194	107
10—Slip—Deductions from store account	195	107
11—Slip—Deductions from store account	195	108
9—Slip—Deductions from store account	196	108
Defendant's Exhibit D—Certificate of incorporation of Federal Contracting Co	197	109
B—Certificate of incorporation of Breakwater Co	201	110
F—Card	207	114
G—Card	207	114
H—Card	208	115
Petition for writ of error	209	115
Order allowing writ of error	211	116
Assignments of error	213	117
Bond	258	140
Citation	263	143
Petition for cross-writ of error	265	144
Order allowing cross-writ of error	267	144
Writ of error (cross)	268	145
Clerk's certificate	269	146
Assignment of errors on cross-writ of error	271	146
Bond on cross-writ of error	274	148
Citation on cross-writ of error	277	149
Notice of motion to dismiss	279	150
Affidavit of Edward W. Norris	281	151
Frank P. Bartlett	284	153
Emanuel J. Myers	286	154
Order denying motion to dismiss	292	156
Opinion	293	157
Judgment	299	160
Order dismissing cross-writ of error	301	161
Petition for writ of error	302	161
Allowance of writ of error	304	162
Petition for writ of error	305	163
Assignment of errors	308	164
Order allowing writ of error, &c	315	167
Bond on writ of error	318	168
Clerk's certificate	322	171
Citation and service	323	172
Writ of error	325	173

a United States Circuit Court of Appeals for the Second Circuit.

THE UNITED STATES FIDELITY & GUARANTY COMPANY, Plaintiff in Error (Defendant Below),

vs.

THE UNITED STATES, for the Use and Benefit of FRANK P. BARTLETT, Defendant in Error (Plaintiff Below).

THE UNITED STATES, for the Use and Benefit of FRANK P. BARTLETT, Plaintiff in Error (Plaintiff Below),

vs.

THE UNITED STATES FIDELITY & GUARANTY COMPANY and JOHN F. DONOVAN, Defendants in Error (Defendants Below).

Transcript of Record.

Error to the Circuit Court of the United States for the Southern District of New York.

Printed under the direction of the Clerk.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Circuit Court of the United States for the Southern District of New York, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Circuit Court, before you, or some of you, between the United States for the benefit of Frank P. Bartlett, plaintiff against John F. Donovan and the United States Fidelity & Guaranty Company, defendant, a manifest error hath happened, to the great damage of the said United States Fidelity & Guaranty Company, as is said and appears by its complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Judges of the United States Circuit Court of Appeals for the Second Circuit, at the City of New York, together with this writ, so that you have the same at the said place, before the Judges aforesaid, on the tenth day of August, 1910, that the record and proceedings aforesaid being inspected, the said Judges of the United States Circuit Court of Appeals for the Second Circuit, may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

2 Witness, the Honorable John M. Harlan, Associate Justice of the Supreme Court of the United States, this 13th day of July in the year of our Lord one thousand nine hundred and ten

and of the Independence of the United States the one hundred and thirty-four-.

[L. S.]

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America for Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.
E. A. LACOMBE,
U. S. Circuit Judge.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, by virtue of the foregoing Writ of Error, and in obedience thereto, do hereby certify, that the following pages numbered from 3 to 256 inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of United States Fidelity and Guaranty Company, Plaintiff in Error, against United States for the benefit of Frank P. Bartlett, Defendant in Error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 22nd day of December in the year of our Lord one thousand nine hundred and ten
3 and of the Independence of the United States the one hundred and thirty-fifth.

JOHN A. SHIELDS, *Clerk.*

(Endorsed:) The U. S. Circuit Court of Appeals, for the Second Circuit.—United States Fidelity and Guaranty Co., Plaintiff in Error (Defendant below), vs. U. S. for benefit of Frank P. Bartlett et ano., Defendant- in Error.—Original.—Writ of Error.—Sumner Bowman, 66 Liberty Street, Attorney for Plaintiff in Error, New York City, U. S. A.—Service of a copy of the within Writ of Error is hereby admitted this 13th day of June, 1910.—Edward W. Norris, Attorney for Defendant in Error.—U. S. Circuit Court, Southern District, N. Y.—Filed Jul- 13, 1910.—John A. Shields, Clerk.

United States Circuit Court, Southern District of New York.

UNITED STATES, for the Benefit of FRANK P. BARTLETT,
against
THE UNITED STATES FIDELITY AND GUARANTY COMPANY, JOHN F. DONOVAN.

To the above-named defendant-:

You are hereby summoned to answer the complaint in this action and to serve a copy of your answer on the plaintiff's attorney

4 within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, at the Borough of Manhattan, in the City of New York, this 25th day of May, in the year one thousand nine hundred and nine.

[L. S.] JOHN A. SHIELDS, *Clerk.*

EDWARD W. NORRIS,
Plaintiff's Attorney.

Office and Post-Office Address, 42 Broadway, Borough of Manhattan, New York City.

United States Circuit Court, Southern District of New York.

UNITED STATES, for the Benefit of FRANK P. BARTLETT, Plaintiff,
against
THE UNITED STATES FIDELITY & GUARANTY COMPANY and JOHN F. DONOVAN, Defendants.

The United States suing herein for the benefit of, and on behalf of Frank P. Bartlett, brings this action pursuant to an Act
5 of Congress, approved August 13th, 1894, 28 Stat. 278, C. 280, and complaining of the defendants, alleges:

First. That The United States Fidelity & Guaranty Company during all times hereinafter mentioned, was a corporation organized and existing under the laws of the State of Maryland, and has an office, for the transaction of its business, in the Borough of Manhattan, City, State and Southern District of New York.

Second. That on or about the 18th day of February, 1903, a formal contract in writing was duly made and entered into between the United States and the defendant, John F. Donovan, the United States being represented by Major George W. Goethals, Corps of Engineers, U. S. A., for and in behalf of the United States of America, for the breakwater construction, Harbor of Refuge, at Point Judith, R. I.

For the terms and provisions of said contract, the said plaintiff begs leave to refer to the duly certified copy of said contract, applied for by the said plaintiff and furnished by the War Department of the United States, pursuant to the Act of Congress of the United States, approved August 13th, 1894, entitled: "An act for the protection of persons furnishing material and labor for the construction of public works." That the said certified copy of said contract is hereto annexed.

Third. That said Frank P. Bartlett, the plaintiff herein, alleges that at the time of entering into the aforesaid contract with the United States, the defendant John F. Donovan, as principal, and the defendant The United States Fidelity & Guaranty Company, as

surety, duly executed and delivered a bond, pursuant to the terms of said Act of Congress approved August 13th, 1894. That said Frank P. Bartlett, pursuant to said Act, duly applied for and
6 obtained a certified copy of said bond, which is hereto annexed. That said bond contains the condition that said John F. Donovan, shall promptly make full payment to all persons supplying labor or materials in the prosecution of the work provided for in said contract, between the said John F. Donovan and the United States.

Fourth. That prior to the execution of the above bond, and with the consent of the defendant, The United States Fidelity & Guaranty Company, the defendant, John F. Donovan, engaged Hughes Brothers & Bangs as his sub-contractors or agents to carry out his contract with the United States; that in the prosecution of constructing the Harbor of Refuge, at Point Judith, R. I., it was necessary to employ a large force of laborers at Sachems Head, in the State of Connecticut, to quarry out stone which would be carried on the scows and deposited on the breakwater aforesaid.

Fifth. That during the year 1903, the plaintiff herein kept a general store situated at the quarry in Sachems Head, in the County of New Haven, and State of Connecticut. This store was stocked with sundry goods, wares and merchandise, and said goods were purchased by the laborers in manner and form as hereinafter set forth.

Sixth. That from March 1st, to December 1st, under an agreement made by the plaintiff and defendant John F. Donovan, and his sub-contractors and agents, Hughes Brothers & Bangs, and the laborers aforesaid, at the end of each month, the amount of purchases made by the laborers would be totaled and the laborers would assign all their right, title and interest in and to such amount of their wages, as would equal their purchases, to the plaintiff herein, to pay for the goods purchased from the plaintiff, and plaintiff
7 in pursuance to such agreement would notify the defendant John F. Donovan, or his sub-contractors and agents, Hughes Brothers & Bangs, to deduct from the wages of the various laborers the various amounts sent in by the plaintiff; the amount so deducted and assigned appearing each month on the pay-rolls of John F. Donovan, or his sub-contractors and agents, and, in addition, on pay-envelope of each laborer.

Seventh. That the wages aforesaid was for labor supplied in the prosecution of the work under the aforesaid contract of John F. Donovan with the United States. That such deductions from the wages of the various laborers were in fact made, but never paid to the laborers or this plaintiff by the defendant John F. Donovan, or his sub-contractors or agents, Hughes Brothers & Bangs.

Eighth. That between March 1st and December, 1903, various laborers on the work aforesaid, supplied work, labor, and services to the contractor, the defendant John F. Donovan, in the prosecution of the work provided for in the contract, and they earned and assigned all their right, title and interest in and to their wages amounting to the sum of $10,000.44 to this plaintiff, no part of

which has been paid, except the sum of $2,829.16, although duly demanded.

Wherefore, plaintiff demands judgment against the defendants for the sum of $7,171.28, with interest from December 1st, 1903, together with the costs of this action.

EDWARD W. NORRIS,
Attorney for the Plaintiff.

Office & P. O. Address, 42 Broadway, Borough of Manhattan, City of New York.

8 UNITED STATES OF AMERICA,
Southern District of New York, County of New York, ss:

Frank P. Bartlett, being duly sworn, says that he is the plaintiff in this action; that he has read the foregoing complaint and knows the contents thereof, that the same is true to the knowledge of deponent, except as to the matters herein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

FRANK P. BARTLETT.

Sworn to before me this 4th day of June, 1909.

WARREN McCONIHE,
[SEAL.] *Notary Public, N. Y. Co.*

United States Circuit Court, Southern District of New York.

UNITED STATES, for the Benefit of FRANK P. BARTLETT, Plaintiff,
against
THE UNITED STATES FIDELITY & GUARANTY COMPANY and JOHN F. DONOVAN, Defendants.

Amended Answer.

The defendant, The United States Fidelity & Guaranty Company, impleaded herein with the defendant, John F. Donovan, for an amended answer to the complaint in this action, by Sumner Bowman, its attorney, alleges as follows:

First. It denies that it has any knowledge or information sufficient to form a belief as to each and every allegation, matter
9 and statement contained in the paragraphs of the complaint marked "Second," "Fourth," "Fifth," "Sixth," "Seventh" and "Eighth."

Second. The defendant admits that it made and executed a bond as surety for John F. Donovan, mentioned in the complaint, for the performance of an alleged contract between the said John F. Donovan and the United States, and denies that it has any knowledge or information sufficient to form a belief as to each and every other allegation or matter contained in the paragraph of the complaint marked "Third."

Third. That except as hereinbefore admitted or denied, this defendant denies that it has any knowledge or information sufficient to form a belief as to each and every other matter contained in the said complaint.

This defendant further answering, and for a first further and separate defense, alleges:

First. That the said plaintiff has been fully paid for all labor and materials supplied or furnished by him in the prosecution of the work provided for in the contract hereinbefore mentioned, and secured by the bond hereinbefore mentioned and referred to in the said complaint, reference to which allegations are here specifically made, and the same are hereby made a part hereof, as if the same were herein particularly alleged and set forth.

This defendant further answering, and for a second, further, separate and distinct defense, alleges:

First. That during all the times in the complaint mentioned the defendant, United States Fidelity & Guaranty Company, was
10 a corporation organized and existing under the Laws of the State of Maryland, where it had and now has its domicile, and had and now has its residence in the City of Baltimore, in the State of Maryland.

Second. Upon information and belief, that the Statutes and Public General Laws of the State of Maryland have been and are duly passed and enacted by the Public Assembly or Legislature of the said State of Maryland, and are entitled and known as "Public General Laws," and that on or about the year 1889 the Public Assembly or Legislature of the State of Maryland duly passed and enacted Public General Laws, and which Public General Laws, among other things, provide and enact as follows:

"1. All actions of account, actions of assumpsit, or on the case, actions of debt on simple contract, detinue or replevin, all actions for trespass, for injuries to real or personal property, all actions for illegal arrest, false imprisonment, or violation of the twenty-third, twenty-sixth, thirty-first and thirty-second articles of the declaration of rights, or any of them, or of the existing, or any future provisions of the code touching the writ of habeas corpus, or proceedings thereunder, and all actions, whether of debt, ejectment or of any other description whatsoever, brought to recover rent in arrear, reserved under any form of lease, whether for ninety-nine yeas renewable forever, or for a greater or lesser period, and all distraints issued to recover such rent shall be commenced, sued or issued within three years from the time the cause of action accrued; and all actions on the case for words, and all actions for assault,
11 battery and wounding, or any of them, within one year from the time the cause of action accrued; this section not to apply to such accounts as concern the trade or merchandise between merchant and merchant, their factors and servants who are not residents within this State."

as will more fully appear by Article 57, Section 1 of Chapter 25 of the Public General Laws of 1889, and that said Statute or Public General Laws is now in full force and effect.

Third. Upon information and belief, that the alleged cause of action in the complaint mentioned arose outside of the State of New York and that during all the times mentioned in the complaint, and when the alleged cause of action set forth in the complaint arose or accrued, the said plaintiff was, and still is, a non-resident of the State of New York, and that during all of the said times the said defendant, United States Fidelity & Guaranty Company, was and still is a resident of the State of Maryland, and upon information and belief, that the Laws of the State of Maryland contain a limitation as to the time for bringing an action brought to recover for a cause of action similar to and like that set forth in the complaint herein.

Fourth. That the said cause of action set forth in the complaint did not accrue within three years prior to the commencement of this action.

This defendant further answering, and for a third further, separate and distinct defense, alleges:

First. That during all the times in the complaint mentioned the defendant, United States Fidelity & Guaranty Company, was a corporation organized and existing under the laws of the State
12 of Maryland, where it had and now has its domicile, and had and now has its residence in the City of Baltimore, in the State of Maryland.

Second. Upon information and belief, that the General Statutes of the State of Connecticut, Revision of 1902, duly passed and enacted by the General Assembly or Legislature of the State of Connecticut, and which are now in full force and effect, among other things, provide and enact as follows:

"SECTION 1110. Actions on simple or implied contracts limited to six years. No action for an account, or for a debt due by book to balance book accounts, or on any simple or implied contract, or upon any contract in writing not under seal, except promissory notes not negotiable, shall be brought but within six years next after the right of action shall accrue; but persons legally incapable to bring any such action at the accruing of the right of action, may sue at any time within three years next after becoming legally capable to bring such action. The provisions of this section shall not apply to actions upon judgments of any court of the United States nor of any court of any state within the United States."

"SECTION 1114. Action on oral contract to be brought within three years. Excepting actions for a debt due by book, or actions founded on proper subjects of book debt, no actions founded upon any express contract or agreement not reduced to writing, or of which some note or memorandum shall not be made in writing and signed by the party to be charged therewith, or his agent, shall be brought but within three years next after the right of action shall accrue."

13 Third. Upon information and belief, that an action to recover upon the alleged cause of action set forth in the complaint, is not an action for a debt due by book nor an action founded or proper subjects of book debt, and such an action is not founded upon any express contract or agreement reduced to writing, nor

founded upon any note or memorandum in writing and signed by this defendant, or its agent.

Fourth. Upon information and belief, that the alleged cause of action mentioned in the complaint arose outside of the State of New York, and that during all the times mentioned in the complaint, and when the alleged cause of action set forth in the complaint arose or accrued, the said plaintiff was, and still is a non-resident of the State of New York, and that during all of the said times the said defendant, United States Fidelity & Guaranty Company, was and still is a resident of the State of Maryland, and upon information and belief, that the laws of the State of Connecticut contain a limitation as to the time for bringing an action to recover for a cause of action similar to and like that set forth in the complaint herein.

Fifth. That the said cause of action set forth in the complaint herein did not accrue within three years next after the right of action or cause of action set forth in the complaint herein accrued.

This defendant further answering, and for a fourth, further, separate and distinct defense, alleges:

First. That the contract mentioned in the complaint herein was fully completed and performed by the contractor, the defendant, John F. Donovan, on or about November 4, 1903, and that the last payment made by the United States Government
14 to the said John F. Donovan for full payment for all labor and materials furnished and supplied in the prosecution of the work provided for by the said contract, was made on or about the 22nd day of December, 1903, and all the retained percentages held by the United States Government for the prosecution of the work and the performance of the said contract, were paid by the United States Government to the said defendant, John F. Donovan, on or about the 22nd day of December, 1903, at the time of making the final payment on the said contract for labor and materials supplied and furnished in the prosecution of the work.

Second. That no notice of any kind or character was ever given by the plaintiff or any one in his behalf, to the defendant Surety Company of the existence of the alleged claim set forth in the complaint herein, or of the non-payment thereof, or of the default of the contractor, John F. Donovan, to pay for the labor and supplies set forth in the complaint, or any item thereof, until about the time of the commencement of this action, to wit, on or about June 4, 1909.

Wherefore this defendant demands judgment that the complaint be dismissed with its costs and disbursements.

SUMNER BOWMAN,
Attorney for Defendant United States Fidelity & Guaranty Company.

Office & P. O. Address, 66 Liberty Street, Borough of Manhattan, City of New York.

STATE OF NEW YORK,
County of New York, ss:

Sylvester J. O'Sullivan, being duly sworn, says:

That he is the Manager and Agent of The United States
15 Fidelity and Guaranty Company, one of the above named defendants; that he has read the foregoing amended answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

That the reason this verification is made by deponent and not by said defendant, is because the defendant is a foreign corporation and deponent is its Manager and Agent.

That the sources of his information and the grounds of his belief as to all matters therein stated to be alleged upon information and belief, are papers and documents in his possession in his official capacity.

SYLVESTER J. O'SULLIVAN.

Sworn to before me this 4th day of May, 1910.

PARKE L. WOODWARD.
Commissioner of Deeds, City of New York.

United States of America.

War Department.

WASHINGTON, *December 14th*, 1908.

I hereby certify that the attached papers, consisting of eight sheets, together with small sheet attached to sheet No. 2, are copies of a contract and bond on file in the United States Engineer Office, at Newport, Rhode Island.

W. L. MARSHALL,
Chief of Engineers, U. S. Army,
By ——— ———.

Be it known that W. L. Marshall, who signed the foregoing certificate, is the Chief of Engineers, U. S. Army, and that to his attestation as such full faith and credit are and ought to be given.

16 In witness whereof, I have hereunto set my hand and caused the seal of the War Department to be affixed, on this 16th day of December, one thousand nine hundred and eight.

[SEAL.] ROBERT SHAW OLIVER.
Assistant Secretary of War.

Affidavit, Acknowledgment, and Justification by the United States Fidelity & Guaranty Company.

STATE OF NEW YORK,
County of New York, ss:

Before me personally came Sylvester J. O'Sullivan, known to me to be the Manager of The United States Fidelity & Guaranty Company, the corporation described in and which executed the annexed bond of John F. Donovan, as surety thereon, who being by me duly sworn, deposes and says, that he resides in the City of New York, State of New York, and that he is the Manager of said The United States Fidelity & Guaranty Company and knows the corporate seal thereof; that said company is duly and legally incorporated under the laws of the State of Maryland; that said company has complied with the provisions of the Act of Congress of August 13th, 1894, allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of John Donovan, is the corporate seal of said The United States Fidelity & Guaranty Company, and was thereto affixed by order and authority of the Board of Directors of said company; and that he signed his name thereto by like order and authority as Manager of said company, and that he is acquainted with G. Terry Sinclair and knows him to
17 be the Attorney in Fact of said company; and that the signature of said G. Terry Sinclair subscribed to said bond is in the genuine handwriting of said G. Terry Sinclair, and was thereto subscribed by order and authority of said Board of Directors and in the presence of said deponent; and that the assets of said company, unincumbered and liable to execution, exceeds its claims, debts and liabilities of every nature whatsoever by more than the sum of one million dollars ($1,000,000.00).

SYLVESTER J. O'SULLIVAN.

Sworn to, acknowledged before me, and subscribed in my presence this 20th day of February, 1903.

JAMES P. WRIGHT,
Notary Public, Kings Co.

Certificate filed in New York Co.

At a regular meeting of the Board of Directors of the United States Fidelity and Guaranty Company, duly called and held on the thirteenth day of October, A. D. 1902, at the office of the Company, in the City of Baltimore, State of Maryland, a quorum being present, on motion it was unanimously

Resolved, that Andrew Freedman, Vice-President, or Sylvester J. O'Sullivan, Manager, or G. Terry Sinclair, or Leonidas Dennis, or James R. Wright, Attorneys in Fact of this Company in the State of New York, be and they hereby are, and each one of them is authorized and empowered to execute and deliver and attach the seal of the Company to any and all bonds and undertakings for, or on behalf of the Company, in its business of guaranteeing the fidelity of persons holding places of public or private trust and the performance of contracts other than insurance policies, and executing or guaranteeing bonds and undertakings required or permitted in

all actions or proceedings or by law required; such bonds
18 and undertakings, however, to be attested in every instance by one other of the persons above named, as occasion may require.

Contractor's Bond (Public Works).

(When Principal is an Individual or a Partnership and Surety is a Corporation.)

Know all men by these presents, That we, John F. Donovan, as principal, and The United States Fidelity & Guaranty Co., a corporation existing under the laws of the State of Maryland, as surety, are held and bound unto the United States of America, in the penal sum of Fifteen thousand ($15,000) dollars, to the payment of which sum well and truly to be made, we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

The condition of this obligation is such, That whereas the above bounden John F. Donovan has, on the 18th day of February, 1903, entered into a contract with the United States, represented by Major Geo. W. Goethals, Corps of Engineers, U. S. A., for breakwater construction, Harbor of Refuge at Point Judith, R. I.,

Now, therefore, if the above bounden John F. Donovan, his heirs, executors or administrators shall and will, in all respects, duly and fully observe and perform all and singular the covenants, conditions and agreements in and by the said contract agreed and covenanted by said John F. Donovan, to be observed and performed according to the true intent and meaning of the said contract, and as well during any period of extension of said contract that may be granted on the part of the United States as during the original term of the same, and shall promptly make full payments to all persons supplying him labor or materials in the prosecution of the work provided for in said contract, then the above obligation shall be void and of no effect; otherwise to remain in full force and virtue.

19 In witness whereof, the parties hereto have executed this instrument this 18th day of February, 1903, the name and corporate seal of said surety being hereto affixed and these presents duly signed by its Manager, pursuant to a resolution of its Board of Directors, passed on the 13th day of October, 1902, a copy of the record of which is on file in the War Department.

In presence of

JOHN J. CAULLET, as to
JOHN F. DONOVAN. [SEAL.]

VINCENT J. BOYLE, as to
THE UNITED STATES FIDELITY & GUARANTY CO.,
By SYLVESTER J. O'SULLIVAN, *Manager.*

Attest:

[SEAL.] G. TERRY SINCLAIR,
Attorney-in-Fact.

(Executed in duplicate.)

[Endorsement:] Office of the Chief of Engineers, March 5, 1903. War Department. 458906-11. Form H. Bond for Fulfillment of Contract with John F. Donovan, New York, N. Y. Dated February 18th, 1903. Constructing Breakwater for Harbor of Refuge, at Point Judith, R. I. This form authorized by Secretary of War, July 5, 1899.

20 PLAINTIFF'S EXHIBIT 12.

Harbor of Refuge at Point Judith, R. I.

Advertisement.

U. S. ENGINEER OFFICE,
NEWPORT, R. I., *December 26, 02.*

Sealed proposals for constructing breakwater at Point Judith, R. I., will be received here until 11 a. m. January 30th, 1903, and then publicly opened. Information furnished on application.

GEO. W. GOETHALS,
Major, Corps of Engineers.

Specifications.

General Instructions for Bidders.

1. The attention of bidders is especially invited to the Acts of Congress approved February 26, 1885, and February 23, 1887, as printed in vol. 23, page 332, and vol. 24, page 414, United States Statutes at Large, which prohibit the importation of foreigners and aliens, under contract or agreement, to perform labor in the United States or Territories or the District of Columbia.

2. Preference will be given to articles or materials of domestic production, conditions of quality and price being equal, including in the price of foreign articles the duty thereon.

3. No proposal will be considered unless accompanied by a guaranty, which should be in manner and form as directed in these instructions.

21 4. All bids and guaranties must be made in triplicate upon printed forms to be obtained at this office.

5. The guaranty attached to each copy of the bid must be signed by an authorized surety company, or by two responsible guarantors, to be certified as good and sufficient guarantors by a Judge or Clerk of a United States Court, United States District Attorney, United States Commissioner, or Judge or Clerk of a State Court of record, with the seal of said court attached.

6. A firm as such will not be accepted as surety, nor a partner for a copartner, or firm of which he is a member. Stockholders who are not officers of a corporation may be accepted as sureties for such corporation. Sureties, if individuals, must be citizens of the United States.

7. When the principal, a guarantor, or a surety is an individual, his signature to a guaranty or bond shall have affixed to it an ad-

hesive seal. Corporate seals will be affixed by corporations, whether principals or sureties. All signatures to proposals, guaranties, contracts and bonds should be written out in full, and each signature to guaranties, contracts and bonds should be attested by at least one witness, and, when practicable, by a separate witness to each signature.

8. Each guarantor will justify in a sum of Five thousand ($5,000) Dollars. The liability of the guarantors and bidder is determined by the Act of March 3, 1883, 22 Statutes, 487, Chap. 120, and is expressed in the guaranty attached to the bid.

9. A proposal by a person who affixes to his signature the word "President," "Secretary," "Agent," or other designation, without disclosing his principal, is the proposal of the individual. That
22 by a corporation should be signed with the name of the corporation, followed by the signature of the president, secretary, or other person authorized to bind it in the matter, who should file evidence of his authority to do so. That by a firm should be signed with the firm name, either by a member thereof or by its agent, giving the names of all members of the firm. Anyone signing the proposal as the agent of another or others must file with it legal evidence of his authority to do so.

10. The place of residence of every bidder, and postoffice address, with county and state, must be given after his signature.

11. All prices must be written as well as expressed in figures.

12. One copy each of the advertisement, the instructions for bidders, and the specifications, all of which can be obtained at this office on application by mail or in person must be securely attached to each copy of the proposal and be considered as comprising a part of it.

13. Proposals must be prepared without assistance from any person employed in or belonging to the military service of the United States or employed under this office.

14. No bidder will be informed, directly or indirectly, of the name of any person intending to bid or not to bid, or to whom information in respect to proposals may have been given.

15. All blank spaces in the proposal and bond must be filled in, and no change shall be made in the phraseology of the proposal, or addition to the items mentioned therein. Any conditions, limitations or provisions attached to proposals will be liable to render them informal and cause their rejection.
23 16. Alterations by erasure or interlineation must be explained or noted in the proposal over the signature of the bidder.

17. If a bidder wishes to withdraw his proposal he may do so before the time fixed for the opening, without prejudice to himself, by communicating his purpose in writing to the officer who holds it, and, when reached, it shall be handed to him or his authorized agent, unread.

18. No bids received after the time set for opening of proposals will be considered.

19. The proposals and guaranties must be placed in a sealed envelope marked "Proposals for Constructing Breakwater to be opened

January 30, 1903," and inclosed in another sealed envelope addressed to Major Geo. W. Goethals, Corps of Engineers, U. S. Army, Newport, R. I., but otherwise unmarked. It is suggested that the inner envelope be sealed with sealing wax.

20. It is understood and agreed that the quantities given are approximate only, and that no claim shall be made against the United States on account of any excess of deficiency, absolute or relative, in the same. Bidders, or their authorized agents, are expected to examine the maps and drawings in this office, which are open to their inspection, to visit the locality of the work, and to make their own estimates of the facilities and difficulties attending the execution of the proposed contract, including local conditions, uncertainty of weather, and all other contingencies.

21. The United States reserves the right to reject any and all bids and to waive any informality in the bids received; also to disregard the bid of any failing bidder or contractor known as such to the Engineer Department, or any bid which is palpably unbalanced or obviously below what the work can be done for, or the bid of any bidder who shall fail to produce, when called upon to do so, evidence satisfactory to the Engineer Officer in charge of the said bidder's ability to do the contemplated work within the required time, including his control of the necessary means and equipment. The failure of a bidder to make satisfactory progress or to complete on time similar work under previous contracts with the United States will be duly considered in canvassing bids and may be a valid cause for the rejection of his proposal. Reasonable grounds for supposing that any bidder is interested in more than one bid for the same item will cause the rejection of all bids in which he is interested.

22. The bidder to whom award is made will be required to enter into written contract with the United States with good and approved security, in an amount of fifteen thousand (15,000) dollars, within ten (10) days after being notified of the acceptance of his proposal. The contract which the bidder and guarantors promise to enter into shall be, in its general provisions, in the form adopted and in general use by the Engineer Department of the Army, blank forms of which can be inspected at this office, and will be furnished, if desired, to parties proposing to put in bids. Parties making bids are to be understood as accepting the terms and conditions contained in such form of contract.

23. The sureties, if individuals, are to make and subscribe affidavits of justification on the back of the bond to the contract, and they must justify in amounts which shall aggregate double the amount of the penal sum named in the bond.

24. Bidders are invited to be present at the opening of the bids.

General Conditions.

25. A copy of the advertisement, and of the specifications, instructions and conditions will be attached to the contract and form a part of it.

26. The contractor should, within ten days from the award of the contract, furnish the office with the post-office address to which communications should be sent.

27. Transfers of contracts or of interests in contracts are prohibited by law.

28. The contractor will not be allowed to take advantage of any error or omission in these specifications, as full instructions will always be given should such error or omission be discovered.

29. The decision of the Engineer Officer in charge as to quality and quantity shall be final.

30. Payments will be made monthly. A percentage of ten (10) per centum will be reserved from each payment until completion of the contract.

31. The contractor will be required to commence work under the contract as soon after the date of notification of approval of the contract by the Chief of Engineers, U. S. Army, as weather conditions will permit, not later than April 1, 1903, to prosecute the said work with faithfulness and energy and to complete it within fifteen working months after the date of commencement.

32. Unless extraordinary and unfor-seeable conditions supervene, the time allowed in these specifications for the completion of the contract to be entered into is considered sufficient for such
26 completion by a contractor having the necessary plant, capital and experience. If the work is not completed within the period stipulated in the contract, the Engineer Officer in charge may, with the prior sanction of the Chief of Engineers, waive the time limit and permit the contractor to finish the work within a reasonable period, to be determined by the said Engineer Officer in charge. Should the original time limit be thus waived, all expenses for inspection and superintendence and other actual loss and damages to the United States due to the delay beyond the time originally set for completion shall be determined by the said Engineer Officer in charge and deducted from any payments due or to become due to the contractor; Provided however, that the party of the first part may, with the prior sanction of the chief of Engineers, waive for a reasonable period the time limit originally set for completion and remit the charges for expenses of superintendence and inspection for so much time as in the judgment of the said Engineer Officer in charge may actually have been lost on account of unusual freshets, ice, rainfall, or other abnormal force or violence of the elements, or by epidemics, local or State quarantine restrictions, or other unfor-seeable cause of delay arising through no fault of the contractor, and which prevented him from commencing or completing the work or delivering the materials within the period required by the contract; Provided further, that nothing in these specifications shall affect the power of the party of the first part to annul the contract as provided in the form of contract adopted and in use by the Engineer Department of the Army.

33. The contractor will be required to hold the United States harmless against all claims for the use of any patented ar-
27 ticle, process or appliance in connection with the contract herein contemplated.

34. The work to be done is the construction of a rip-rap breakwater extending out from the shore of Point Judith, R. I., at a point about 1,300 feet northwesterly from the lighthouse. The shore is covered with cobble stones and boulders. The site of the work is exposed to all southerly storms, and there is a surf breaking on the shore at nearly all times; it is within about half a mile of the protection formed by the present breakwater.

The amount available for the work is $100,000; from which must be deducted the expenses of supervision and contingencies.

The foregoing is considered to be a fair description of the locality and proposed work, but bidders are expected to satisfy themselves as to the same by actual inspection of the locality, as no allowance will be made for any variations from the above discovered during the progress of the work.

35. The mean rise and fall of the tide is about 4 feet.

36. The breakwater will have the following cross section: 20 feet wide on top at a height of 10 feet above mean low water; harbor slope 1 on 1, sea slope 1 on 2 to a depth of 12 feet at mean low tide and thence 1 on 1.

The core, or that portion of the breakwater which is 10 feet or more inside of the exterior surfaces may be built of any sized stones exceeding 50 lbs. per piece. The facing or covering stone must be composed of stones weighing at least 3 tons each, except that occasional smaller stones may be used where necessary to fill up openings and give a firm bearing for the larger stone.

The stones of the facing must be put in position with care (not merely dropped in place) and the exterior surfaces made
28 reasonably even and the top surface level.

The shore end of the breakwater shall be carried into the sandy bank or bluff, which shall be protected by a substantial revetment of stone for a distance of 100 feet on the seaward side and 30 feet on the harbor or side of the breakwater. The foot of the slope of the revetment is to be composed of stones weighing not less than 1 ton each.

The contractor may, if he so desires, commence the work of depositing stone in water of 10 feet depth and carry the work in towards the shore, and after completing the shore section continue the construction into deeper water as far as the funds will permit. The entire length of breakwater constructed must be built to full cross section.

37. The "core" stone must be of durable quality, not liable to disintegration in sea water; should be at least as hard as hard-burned brick; and should weigh, dry, at least 140 pounds per cubic foot. The "facing stone" must be granite or gneiss; must be at least as heavy as the core stone; and should be quarry stone, of angular shapes (not of rounded shapes, neither parts of boulders nor resembling boulders). All the stone must be of sizes as described in preceding paragraph, and its quality, size and shape must be satisfactory to the Engineer Officer in charge. A sample of the stone, and the names and locations of the quarries to be used, should accompany the bid.

38. The stone will be measured and paid for in tons of 2,000 pounds. The vessels, scows and lighters, in which the rip rap stone is delivered shall be newly "weighed in" and marked by legally sworn weighers, when first used; and the sworn certificates
29 and a detailed description of the marks shall be furnished by the weighers, at the expense of the contractor. Should the draft marks of the vessels, scows or lighters be unauthorizedly interfered with during the progress of the work, or should there appear any doubts as to their accuracy, the vessel, scow or lighter may at any time be again weighed in and new marks established, at the expense of the contractor and under the direction of the Engineer Officer in charge; and any deductions which it may be found necessary to make in order to correct the load of the vessels, scows, or lighters thus reweighed, should be also applied to each and all preceding loads of the same vessel, scow or lighter, back to its last weighing in under this contract. All vessels, scows, or lighters carrying stone must be pumped as dry as possible before each measurement and each reading of draft marks; and each of these vessels, scows and lighters must be kept reasonably sound and water tight; and each must have its number or name conspicuously cut or painted upon it. Dirt, rubbish and rejected stone are to be left on the vessels, scows or lighters until after light measurements have been made. Payments may be made according to either actual scale weights, scow displacement weights, or vessel displacement weights at the choice of the Engineer Officer in charge, as work progresses. In case of rough water at the site of the work the contractor shall upon the request of the authorized agent of the Engineer Officer in charge, take his vessel into smooth water for the purpose of reading the draft marks. The contractor or his agent will be entitled at all times to see or examine the record of measurements assigned to his deliveries, and any disagreements on his part as to weights or classification of stone should be reported by him to the Engi-
30 neer Officer in charge in writing within twenty-four hours of their occurrence. In case of dispute as to measurements, the decision of the Engineer Officer in charge shall be final.

39. Rubbish and material other than stone of the size and quality above described, will not be accepted for use in the breakwater; and should any appear to have been so used its weight will be deducted from the amounts to be paid for. Stone deposited outside of the limits above prescribed for the work under construction, or deposited before being measured or weighed by the inspector will likewise be deducted from the amounts to be paid for; and if such stone (moorings stones included) prove to be in places where they obstruct or endanger navigation, they must be removed by the contractor at his own expense before final payments are made to him.

40. The location of the work will be marked in advance by the Inspector. All stakes, range boards, tide gauges, etc., must be furnished and set by the contractor under the direction of the Inspector and without expense to the United States. The contractor must keep on hand a sufficient number of the aforesaid articles to supply losses, and must provide suitable boats and men for setting them

and for assisting the Inspector in taking soundings or for other work in connection with his duties. He must also furnish the Inspectors with board and lodgings at least equal to that furnished any of his employees. The cost of these items to be included in the price bid for the work.

41. Duly authorized Inspectors (if necessary one at each quarry, or with each tow) sufficient to verify measurements, under the orders of the Engineer Officer in charge, will see that the range
31 stakes, mark, gauges, etc., are kept in condition; will point out the work to be done, and will make the necessary soundings, measurements, etc. The contractor must provide such water transportation for the Inspectors as may be necessary both ways between the shore and place of work; and in all cases he must also provide them with such boats, men, materials and other facilities as they may occasionally require in establishing and verifying ranges and gauges, in sounding and in otherwise inspecting the work. No work of placing stone is to be done before or after daylight nor on Sundays or legal holidays.

42. Any employee of the contractor who shall be guilty of improper acts or unfair work, and whose discharge is demanded on such grounds by the Engineer Officer in charge, shall be at once discharged from the work by the contractor, and shall not again be employed upon it. Such discharge shall not form the basis of any claim for compensation or damages against the United States or any of its officers or agents.

43. All plant employed upon the work must be so placed as not to interfere any more than absolutely necessary with the regular navigation of the neighborhood by steamers and sailing vessels. The contractor must, during the progress of the work, keep suitable lights each night, from sunset to sunrise, upon all his vessels anchored upon or near the work, and must promptly repair, at his own expense, all damages resulting from neglect to keep such lights. The contractor must also take all reasonable precautions for the preservation of life in case of accidents. The United States will not be responsible for any accidents or injury to the contractor's employees, plant, or materials, nor for any damage done by or to them from any source or cause.

32 44. Bidders will state their prices as follows:

Per ton of 2,000 pounds of stone delivered in position in the work.

The price as bid is considered as covering all risks, delays and work of all kind connected with the construction of the breakwater.

Proposal for Breakwater Construction.

——— — 1903

To Major Geo. W. Goethals, Corps of Engineers, Newport, R. I.

SIR: In accordance with your advertisement of December 26, 1902, inviting Proposals for Breakwater Construction at Point Judith, R. I., and subject to all the conditions and requirements thereof, and of your specifications of same date, copies of both of which are hereto attached, and, so far as they relate to this pro-

posal, are made a part of it, we (or I) propose to furnish the necessary plant and material and construct breakwater at Point Judith, R. I., at the rate of —— (——) dollars and —— (——) cents per ton of 2,000 pounds, for stone delivered in position in the work.

We (or I) make this proposal with a full knowledge of the kind, quantity and quality of the articles required, and if it is accepted, will after receiving written notice of such acceptance enter into contract within the time designated in the specifications, with good and sufficient sureties for the faithful performance thereof.

(Signature) —— ——,
(Address) —— ——.
(Signature) —— ——,
(Address) —— ——.

(Signed in triplicate.)

33 *Guaranty to Accompany Proposal.*

The —— —— of —— a corporation existing under the laws of the State of —— hereby undertake that if the bid of —— herewith accompanying, dated ——— , 1903, for Breakwater Construction at Point Judith, R. I., be accepted as to any or all of the items of supplied materials, and services proposed to be furnished thereby, or as to any portion of the same, within sixty days from the date of the opening of proposals therefor, the said bidder —— —— will, within ten days after notice of such acceptance, enter into a contract with the proper officer of the United States to furnish such articles of supplies and materials and such services of those proposed to be furnished by said bid as shall be accepted, at the prices offered by said bid and in accordance with the terms and conditions of the advertisement inviting such proposals, and will give bond with good and sufficient surety or sureties as may be required for the faithful and proper fulfillment of such contract. And said corporation hereby binds itself and its successors to pay to the United States, in case the said bidder shall fail to enter into such contract or give such bond within ten days after said notice of acceptance, the difference in money between the amount of the bid of said bidder on the articles or services so accepted and the amount for which the proper officer of the United States may contract with another party to furnish said articles and services, if the latter amount be in excess of the former.

34 In witness whereof, the name and corporate seal of said corporation has been hereto affixed this — day of ——, 1903, and these presents duly signed by its ——, pursuant to a resolution of its ——, passed on the — day of ——, A. D. 1903, a copy of the record of which is on file in the War Department.

—— ——,
By —— ——.
—— ——.

Attest:

—— ——.
—— ——.

(Executed in triplicate.)

Guaranty to Accompany Proposal.

We, —— ——, of —— ——, in the County of ——, and State of —— ——, and —— ——, of —— ——, in the County of ——, and State of ——, hereby undertake that if the bid of —— ——, herewith accompanying, dated —— —, 1903, for Breakwater Construction at Point Judith, R. I., —— —— be accepted as to any or all of the items of supplies, materials and services proposed to be furnished thereby, or as to any portion of the same, within sixty days from the date of the opening of proposals therefor, the said bidder —— —— will, within ten days after notice of such acceptance, enter into a contract with the proper officer of the United States to furnish
35 such articles of supplies and materials and such services as those proposed to be furnished by said bid as shall be accepted, at the prices offered by said bid and in accordance with the terms and conditions of the advertisement inviting said proposals, and will give bond with good and sufficient surety or sureties as may be required for the faithful and proper fulfillment of such contract. And we bind ourselves, our heirs, executors and administrators, jointly and severally to pay to the United States, in case the said bidder shall fail to enter into such contract or give such bond within ten days after said notice of acceptance the difference in money between the amount of the bid of said bidder on the articles or services so accepted and the amount for which the proper officer of the United States may contract with another party to furnish said articles and services, if the latter amount be in excess of the former.

Given under our hands and seals this — day of ——, nineteen hundred and three.

—— ——.
—— ——.

In presence of
—— —— as to —— ——.
—— —— as to —— ——.

Affix adhesive seal.

STATE OF ——,
County of ——, *ss:*

I, —— ——, one of the guarantors named in the foregoing guaranty do swear that I am pecuniarily worth the sum of Five thousand (5000) Dollars over and above all my debts and liabilities.

Subscribed and sworn to before me this — day of ——, 1903, at ——.

36 STATE OF ——. —— ——.
County of ——, *ss:*

I, ——, one of the guarantors named in the foregoing guaranty do swear that I am pecuniarily worth the sum of Five thousand (5000) Dollars over and above all my debts and liabilities.

Subscribed and sworn to before me this — day of ——, 1903, at ——.

——— ———.

I, ——— ———, do hereby certify that ——— ——— and ——— ———, the guarantor above named, — personally known to me, and that, to the best of my knowledge and belief, — is pecuniarily worth over and above all debts and liabilities, the sum stated in the accompanying affidavit subscribed by him.

——— ———.

I, ——— ———, do hereby certify that ——— ——— and ——— ———, the guarantor above named, — personally known to me, and that, to the best of my knowledge and belief, — is pecuniarily worth over and above all debts and liabilities, the sum stated in the accompanying affidavit subscribed by him.

——— ———.

37 (Endorsement:) No. —. Proposal of ——— ———, ——— ———, for breakwater construction harbor of refuge at Point Judith, R. I. ———. Opened at the U. S. Engineer Office, Newport, R. I., Jan. 30th, 1903.

1. This agreement entered into this eighteenth day of February, Nineteen hundred three, between Major Geo. W. Goethals, Corps of Engineers, United States Army, of the first part, and John F. Donovan, of New York, in the County of New York, State of New York, of the second part.

Witnesseth, that in conformity with the advertisement and specifications hereunto attached, which form a part of this contract, the said Major Geo. W. Goethals for and in behalf of the United States of America, and the said John F. Donovan, do covenant and agree, to and with each other, as follows:

That the said John F. Donovan party of the second part, is to furnish and deliver all the material and do all the work of breakwater construction required for Harbor of Refuge, at Point Judith,
38 R. I., conforming in all respects to the specifications hereto attached.

In consideration of the party of the second part performing the required work (in amount about $100,000 including contingencies) the party of the first part agrees to pay the party of the second part at the following rate:

For stone in position in the work, at the rate of two (2) dollars and seventy-five (75) cents per ton of two thousand (2000) pounds.

2. All materials furnished and work done under this contract shall, before being accepted, be subject to a rigid inspection by an inspector appointed on the part of the government, and such as does not conform to the specifications set forth in this contract shall be rejected. The decision of the engineer officer in charge as to quality and quantity shall be final.

3. The said party of the second part shall commence, prosecute,

and complete the work herein contracted for as set forth in paragraph 31 of the attached specifications.

4. If, in any event, the party of the second part shall delay or fail to commence with the delivery of the material or the performance of the work on the day specified herein, or shall in the judgment of the engineer in charge, fail to prosecute faithfully and diligently the work in accordance with the specifications and requirements of this contract, then in either case the party of the first part or his successor legally appointed, shall have power, with the sanction of the Chief of Engineers, to annul this contract by giving notice in writing to that effect to the party (or parties, or either of them) of the second part, and upon the giving of such notice
30 all payments to the party or parties of the second part under this contract shall cease, and all money or reserved percentage due or to become due the said party or parties of the second part, by reason of this contract, shall be retained by the party of the first part until the final completion and acceptance of the work herein stipulated to be done; and the United States shall have the right to recover from the party of the second part whatever sums may be expended by the party of the first part in completing the said contract in excess of the price herein stipulated to be paid the party of the second part for completing the same, and also all costs of inspection and superintendence incurred by the United States, in excess of those payable by the United States during the period herein allowed for the completion of the contract by the party of the second part; and the party of the first part may deduct all the above-mentioned sums out of or from the money or reserved percentage retained as aforesaid, and upon the giving of the said notice the party of the first part shall be authorized to proceed to secure the performance of the work or delivery of the materials, by contract or otherwise in accordance with law.

5. It is further agreed that if the party of the second part shall fail to prosecute the work covered by this contract so as to complete the same within the time agreed upon, the party of the first part may, with the prior sanction of the Chief of Engineers, in lieu of annulling the contract under the preceding paragraph, waive the time limit and permit the party of the second part to *furnish* the work within a reasonable period, to be determined by the said party of the
40 first part. Should the original time limit be thus waived, all expenses for inspection and superintendence, and all other actual losses and damages to the United States due to the delay beyond the time originally set for completion shall be determined by the said party of the first part and deducted from any payments due or to become due the party of the second part; Provided, however, that the party of the first part may, with the prior sanction of the Chief of Engineers, remit the charges for expenses of inspection and superintendence for so much time as in the judgment of the said party of the first part may actually have been lost on account of unusual freshets, ice, rainfall, or other abnormal force or violence of the elements, or by epidemics, local or State quarantine restrictions, or other unforeseeable cause or delay arising through

no fault of the party of the second part, and which actually prevented him (or them) from commencing or completing the work or delivering the materials within the period required by the contract, but such waiver of the time and remission of charges shall *be* in no other manner affect the rights or obligations of the parties during this contract.

6. If, at any time during the prosecution of the work, it be found advantageous or necessary to make any change or modification in the project, and this change or modification should involve such change in the specifications as to character and quantity, whether of labor or material, as would either increase or diminish the cost of the work, then such change or modification must be agreed upon in writing by the contracting parties, the agreement setting forth fully the reasons for such change, and giving clearly the quantities and prices of both material and labor thus substituted for those
41 named in the original contract, and before taking effect must be approved by the Secretary of War: Provided that no payments shall be made unless such supplemental or modified agreement was signed and approved before the obligation arising from such modification was incurred.

7. No claim whatever shall at any time be made upon the United States by the party or parties of the second part for or on account of any extra work or material performed or furnished under or by virtue of this contract, and not expressly required in writing by the party of the first part or his successors, the prices and quantities thereof having been first agreed upon by the contracting parties and approved by the Chief of Engineers.

8. The party of the second part shall be responsible for and pay all liabilities incurred in the prosecution of the work for labor and material.

9. It is further agreed by and between the parties hereto that until final inspection and acceptance of, and payment for, all of the material and work herein provided for, no prior inspection, payment, or act is to be construed as a waiver of the right of the party of the first part to reject any defective work or material or to require the fulfillment of any of the terms of the contract.

10. The party of the second part further agree*d* to hold and save the United States harmless from and against all and every demand, or demands, of any nature or kind, for, or on account of, the use of any patented invention, article or process included in the materials hereby agreed to be furnished and work to be done under this contract.

42 11. Payments shall be made to the said party of the second part as prescribed in paragraph 30 of the specifications hereto attached and forming part of this agreement.

12. Neither this contract nor any interest therein, shall be transferred to any other party or parties, and in case of such transfer the United States may refuse to carry out this contract either with the transferrer or the transferee, but all rights of action for any breach of this contract by said John F. Donovan are reserved to the United States.

13. No member of or Delegate to Congress, nor any person belonging to, or employed in, the military service of the United States, is or shall be admitted to any share or part of this contract, or to any benefit which may arise herefrom.

14. This contract shall be subject to approval of the Chief of Engineers, U. S. A.

In witness whereof the parties aforesaid have hereunto placed their hands the date first hereinbefore written.

Witnesses:

ASA B. KENNAN, as to

GEO. W. GOETHALS,
Major, Corps of Engineers, U. S. A.

JOHN E. IRWIN, JR., as to

[SEAL.] JOHN F. DONOVAN.

——— ———, as to ———.

——— ———, as to ———.

(Executed in triplicate.)

Approved March 16th, 1903.

A. MACKENZIE,
Acting Chief of Engineers, U. S. Army.

43 I do solemnly swear that the copy of contract hereto annexed is an exact copy of a contract made by me personally with ——— ———; that I made the same fairly, without any benefit or advantage to myself, or allowing any such benefit or advantage corruptly to the said ——— ——— or any other person; and that the papers accompanying include all those relating to the said contract as required by the statute in such case made and provided.

———,
Corps of Engineers.

Subscribed and sworn to before me this — day of ———, 190–.

———.

I certify that the award of the foregoing contract was made to the lowest responsible bidder for the best and most suitable articles and service, on proposals received in response to advertisement hereto attached, which was published for thirty days by newspapers and that further advertisement was impracticable.

GEO. W. GOETHALS,
Major, Corps of Engineers, U. S. A.,
Contracting Officer.

(Endorsement:) Office of the Chief of Engineers, War Department, March 5, 1903. 45896-7. Copy. Articles of Agreement, Entered into Feb'y 18, 1903, Between Major Geo. W. Goethals, of

the one part, and John F. Donovan, of the other part, for Constructing Breakwater, Harbor of Refuge, at Point Judith, R. I.

44 At a Stated Term of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, held at the United States Court Rooms, in the Borough of Manhattan, in the City of New York, on Friday, the 20th day of May, in the year of our Lord one thousand nine hundred and ten.

Present: The Honorable Learned Hand, Judge.

L 4-9.

UNITED STATES for FRANK P. BARTLETT
vs.
U. S. FIDELITY & GUARANTY Co. et al.

Now comes the plaintiff by E. W. Norris, Esq., his attorney, and moves the trial of this action. Likewise comes the defendant by E. J. Meyers, Esq., its attorney. Thereupon a jury was duly impanelled and sworn and the cause proceeded. After hearing the evidence for the respective parties, and on Wednesday, May 25th, the arguments of counsel and the charge of the Court the Jury retire in custody of an officer duly qualified to attend them to consider of their verdict, and on their return say they find a verdict in favor of the plaintiff for $2,825.37 with interest.

Mr. Meyers moves to set aside verdict and for a new trial. Denied. Exception.

45 Mr. Meyers moves to set aside verdict as to interest. Decision reserved.

An Extract from the Minutes.

[SEAL.]

JOHN A. SHIELDS, *Clerk.*

At a Stated Term of the Circuit Court of the United States for the Southern District of New York, held in the Post Office Building, Borough of Manhattan, City of New York, on the 16th day of June, 1910.

Present: Hon. Learned Hand, Justice.

UNITED STATES for the Benefit of FRANK P. BARTLETT, Plaintiff,
against
THE UNITED STATES FIDELITY & GUARANTY COMPANY and JOHN F. DONOVAN, Defendants.

The defendant, The United States Fidelity & Guaranty Company, having moved at the conclusion of the trial in the above entitled action, and after the verdict of the jury to set aside the verdict in-so-far as interest was allowed by the jury upon the principal amount of plaintiff's claim as found, and the plaintiff by his coun-

sel, having moved the Court to deny the said motion, and due
46 deliberation being had thereon, it is, upon motion of the attorney for the defendant, The United States Fidelity and Guaranty Company,

Ordered, that the verdict be set aside and disallowed in-so-far as it awards interest to the plaintiff, and that the plaintiff have an exception to this ruling.

LEARNED HAND, *U. S. J.*

(Endorsed:) U. S. Circuit Court, Southern District, N. Y.—Filed Jun- 15, 1910.—John A. Shields, Clerk.

United States Circuit Court, Southern District of New York.

UNITED STATES for the Benefit of FRANK P. BARTLETT, Plaintiff,
against
THE UNITED STATES FIDELITY & GUARANTY COMPANY and JOHN F. DONOVAN, Defendants.

Judgment.

The issues in this action having been duly brought on for trial before Mr. Justice Learned Hand, and a Jury, at a Trial
47 Term of this Court held on the 20th, 23rd, 24th and 25th days of May, 1910, in the Post Office Building, in the Borough of Manhattan, City of New York, and the issues having been duly tried and a verdict having been duly rendered in favor of the plaintiff, and against both of the defendants on said 25th day of May, 1910, -or the sum of Twenty-eight hundred twenty-five and 37/100 ($2825.37) Dollars, with interest from October 20th, 1905, to May 25th, 1910, amounting to the sum of Seven hundred seventy-nine and 33/100 ($779.33) Dollars, and the verdict of the jury in allowing interest having been set aside and disallowed by order of this Court, filed June 15th, 1910, and the interest on $2825.37 from May 25th, 1910, to June 15th, 1910, amounting to Nine and 42/100 ($9.42) Dollars making a total of $2834.79, and the costs of said plaintiff having been adjusted at One Hundred Twenty-six and 10/100 Dollars;

Now, on motion of Edward W. Norris, Esq., Attorney for said plaintiff, it is

Adjudged that the said plaintiff, United States, for the benefit of Frank P. Bartlett, recover from and against the defendants, The United States Fidelity & Guaranty Company, and John F. Donovan, the sum of $2,834.79 found by the Jury, together with the sum of One Hundred Twenty-six and 10/100 Dollars, costs of this action as taxed, in all amounting to the sum of $2,960.89, and that the plaintiff have execution therefor.

Dated, New York, June 15th, 1910.

JOHN A. SHIELDS, *Clerk.*

Defendant John F. Donovan not summoned.

(Endorsed:) U. S. Circuit Court, Southern District N. Y.—Filed Jun- 15, 1910, 4.30 P. M.—John A. Shields, Clerk.

48 At a Term of the Circuit Court of the United States for the Southern District of New York, Second Circuit, held at the Post Office Building, in said District, in the Borough of Manhattan, on the 29th day of June, 1910.

Present: Hon. Learned Hand, Judge of the U. S. Circuit Court.

UNITED STATES for the Benefit of FRANK P. BARTLETT, Plaintiff,
against
UNITED STATES FIDELITY & GUARANTY Co. and JOHN F. DONOVAN, Defendants.

A motion having duly come on to be heard before me upon an order to show cause, signed by me on the 25th of June, 1910, now on reading and filing the said order to show cause, and the affidavit of Gordon S. P. Kleeberg, upon which the same was granted, and the subscribed consent of the attorney for the plaintiff, it is on motion of Sumner Bowman, attorney for the United States Fidelity & Guaranty Co.

Ordered that the judgment heretofore entered herein on the 15th day of June, 1910, which judgment in terms is against both
49 the defendants herein, be entered and docketed nunc pro tunc as of said date against both the defendants herein, to wit, the United States Fidelity & Guaranty Co. and John F. Donovan, and it is

Further ordered that the Clerk of the United States Circuit Court be and he hereby is directed to make the requisite entries in his docket and records showing the entry of said judgment against both defendants as of said date, above mentioned.

LEARNED HAND, *U. S. J.*

(Endorsed:) U. S. Circuit Court, Southern District N. Y.—Filed Jul- 1, 1910—John A. Shields, Clerk.

50 United States Circuit Court for the Southern District of New York. Second Circuit.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY, Plaintiff in Error (Defendant Below),
against
THE UNITED STATES for the Benefit of FRANK P. BARTLETT, Defendant in Error (Plaintiff Below), and John F. Donovan (Defendant Below).

Bill of Exceptions.

Appearances:

Edward W. Norris, Attorney for Plaintiff.
Sumner Bowman, Attorney for Defendant, The United States Fidelity and Guaranty Co.
E. J. Myers, of Counsel.

Be it remembered that the above entitled action was regularly brought on for trial at a Circuit Court of the United States held at

the Court Rooms at the United States Post Office Building in the Borough of Manhattan, City of New York, before the Honorable Learned Hand appointed to hold said Court on the 20th, 23rd, 24th and 25th days of May, 1910, and the aforesaid issues
51 so joined between the parties herein as aforesaid, came on to be tried by a jury for that purpose duly empaneled and sworn according to law, at which day came there as well the said plaintiff as the said defendant, The United States Fidelity and Guaranty Company, by their respective attorneys, and the jurors of the jury aforesaid for that purpose duly empaneled to try said issues being called, also came and were then and there in due manner chosen and sworn to try the said issues.

Thereupon counsel for the defendant, The United States Fidelity and Guaranty Company, moved this Court for a dismissal of the complaint because the Court had no jurisdiction.

This motion was denied and an exception duly taken by counsel for the defendant, The United States Fidelity and Guaranty Company.

Thereupon counsel for the said defendant, The U. S. Fidelity and Guaranty Company, moved this Court for a dismissal of the complaint because it did not state facts sufficient to constitute a cause of action, and further moved this Court for judgment on the pleadings because they are inconsistent on the record, there being no replication as required by law.

These several motions were argued by counsel for the respective parties and thereupon denied by the Court, and an exception duly taken by counsel for the said defendant, The United States Fidelity and Guaranty Company, on each ground specified.

52 The Plaintiff through its counsel, opened *his* case to the jury, and thereupon the plaintiff to sustain the issue upon its part offered the testimony of the following witnesses as *his* evidence in chief, and thereupon the plaintiff to maintain said issues called as a witness FRANK P. BARTLETT, who, being duly sworn, testified as follows, in behalf of the plaintiff herein:

Direct examination by Mr. NORRIS:

I live in New York, 154 Bleecker Street. My business is foreman, superintendent, furnishing labor. I have been engaged in the commissary business for about thirty-five years. I am engaged in the commissary business to-day with Ryan & Franke, New York contractors, and I have been engaged with a good many people in this business. In 1903 I was engaged in the same business. In 1903 I was superintendent for Hughes Brothers & Bangs.

I went to Mr. Bangs; I was up to No. 1 Madison Avenue, Mr. Bangs', and he asked me if I would not go up to Connecticut and run that quarry for him, and I says, yes, and so he says to me, "Go up there," he had a contract, he told me, to put up so much stone to make a breakwater.

He engaged me to organize a labor gang to put the stone up to the Point Judith Breakwater in Rhode Island. Then I went around

where I know the labor and I explained if they wanted to go to work, and I explained what we were doing, and I said that the work was quarrying and we would send them up by boat to Rhode Island to the breakwater. The men asked me how we do; "You get paid by the month so much a day, and we have a store where you
53 can have provisions and it will be deducted from you at the end of every month." They said, "All right."

Q. About how many men did you have at Sachem's Head?

Mr. MYERS: To that I object, sir.

The COURT: I do not see the ground for objecting to it.

Objection overruled. Exception by defendant.

A. From 75 to 125.

Q. Men at Sachem's Head?

A. Yes, sir.

Q. Where did these laborers sleep?

A. We built, we had a building up there, I built it, a place for the men to sleep, and also the cooking and a store there.

Q. These men, would they be provided with cooks?

A. With what?

Q. With cooks?

A. Yes.

Mr. MYERS: Your Honor, I submit that is not material in this case.

The COURT: Objection overruled.

Exception by defendant.

By the COURT:

Q. They had cooks provided?

A. Yes, sir, had to provide them with a cook.

By Mr. NORRIS:

Q. Did you have occasion to remain at Sachem's Head between March and December, 1903?

A. I was there mostly all the time.

Q. And you saw these laborers daily?

54 Mr. MYERS: I do not think he ought to be permitted to prove it in that omnibus way.

The COURT: Objection overruled.

Exception by defendant.

A. Yes, sir.

By the COURT:

Q. You went up there and say you stayed there how long?

A. I was superintendent or foreman over them. I was there all the time from March, from the first of March to November 8th or 10th, I have forgotten, 1903. This place is Sachem's Head, about sixteen miles the other side of New Haven, near Guilford, on the coast.

By Mr. NORRIS: I will describe just what duties these laborers had

in this quarry. Some men were taken up—some men would discover and dig the dirt, if so we would discover the rock and drill the holes in there, and some men around the derrick open up the stone and put them in the car and load them; and a truck coming and take them up to Point Judith. The scows were at the end of the dock at the quarry, and they would be taken by steam tugs up to the breakwater. There were some laborers up by the breakwater to look after the shipment of stone; may be fifteen men, probably eighteen.

Q. And then they were deposited according to the lines laid down by the engineer?

Mr. MYERS: Your Honor, this is all guess.

The COURT: You are leading him a good deal, I think. He can tell his story without leading like that.

55 A. This man up there at breakwater, he is there an inspector of the government, and tell him what to do, and also he had a foreman to boss the people and tell him where to put them, what he wanted, and put them wherever the inspectors say.

That store was conducted at the quarry with provisions, and got two men there to attend to the store, and a man comes in and I had some cards right there, and every man would take one of these cards and put his number on, and when he wanted any provisions he would go there and punch whatever he spent. When he got through that card he would take another one he wants, if he wished, until the end of the month, so there would not be any mistake; everybody knows exactly what he gets every day. Then we had a cook there and he would go and buy so much of beef, so much of potato or beans, or tomatoes, or rice or macaroni, or anything he wants to cook for them, and at the end of the month he write down and see how much it come to and deduct so much, and if they want any other provision they mark them down on this ticket, tobacco, or anything, shoes or clothing, or anything they need.

At the time that a card would be used up we would keep them there until the end of the month and then he would get another one; when he got through one he would get another. The cards were numbered one after another, No. 1 and then No. 2; as soon as he used one card we would give another card, it would be numbered 2, and put down the date, the date of the month.

At the end of the month the laborers would come there and see if their account is all right, how much we got on the book.

56 Mr. MYERS: I submit the witness should testify only to personal knowledge.

The COURT: This is to prove the custom of the business. I will take it.

By the COURT: I was there from time to time. I saw this done on several occasions. My men were instructed to do it. I saw them doing it.

By Mr. NORRIS: To make up my statement each month of the amount of purchases made by these various laborers I have got men there to take care of that business. I just make up a bill and send

them down to New York to Hughes Brothers & Bangs. And after he make out, figure out their time——

By the COURT: At the end of the month my men make up the bill and when he see it is all right he send it down to Hughes Brothers & Bangs, in New York, and a few days after come up the money. He did not pay me. He did not pay the labor, he deducted board off of them, and he held them; he paid me as a laborer, yes.

Mr. NORRIS: As I understand this, Bartlett has testified he was superintendent, and now, when he says he has been paid for labor he means the particular labor he was engaged in during the month, and not the particular labor we are suing for.

The COURT: I want to know whether Hughes Brothers & Bangs paid him for his account.

Mr. NORRIS: That is what we are suing for.

The WITNESS: No, sir.

57 By the COURT:

A. They paid me something.

By Mr. NORRIS: I received memoranda and statements from Hughes Brothers & Bangs after I sent them that bill.

By the COURT: I got back certain accounts, certain papers, I got back from Hughes Brothers & Bangs.

By Mr. NORRIS: Mr. Donovan generally paid the men off at Sachem's Head. That is where I received the pay as superintendent; they paid me my salary. I have received from Hughes Brothers & Bangs, or any one else, $2,829.60. In connection with my commissary I am suing for the plain labor account.

I have also been a contractor. My real name is Francisco Bartolotti. I am a naturalized citizen of the United States.

Q. Can you state to the jury upon about how many occasions at the end of each month you were present when these various laborers assigned their wages—only at the time you were present?

Mr. MYERS: Objected to.

The COURT: Objection overruled.

Exception by defendant.

A. Every month, every pay day. These laborers were known by name and number.

58 Mr. MYERS: I object to it, sir, as to whether he was present when they were assigned, on the ground that it embodies a conclusion and the issue in the case, and also on the ground that it is incompetent, immaterial and insufficient to establish an assignment of the wages.

The COURT: Go ahead. Name and number.

The WITNESS: Name and number, and on the book we have kept a number. These slips attached to a book (handing papers to witness) I got from Mr. Donovan's office. I got them from Mr. Donovan. Mr. Donovan was connected at that time with Hughes Brothers & Bangs, the masters there.

Mr. NORRIS. I will have these marked for identification, Your Honor.

Marked for Identification Plaintiff's Exhibits 1, 2, 3, 4, 5.

To try to collect money I have gone up to the office and asked Mr. Bangs, or asked Mr. Donovan for the money, and they told me they are short now, and come in within a day or a month or a week, and it keep on for years, and I never get any.

During the year 1905 I ran a commissary for the same people, 1905 and 1906, and we were under the commissary the same way we did it before. They say to me—I have done work since 1903.

By the COURT: These slips, Exhibits 1 to 5 for Identification, I got from Sachem's Head.

59 When I was short he would send these exhibits back a day or two after pay day. Sometimes a man spends more than he earned, a man come there and maybe he work say the last of the month and he need a pair of shoes or a pair of pants, and he only could get one day's work, and that man is short two days and he sent me back that slip—the office of Hughes Brothers & Bangs sent back the slip.

Mr. MYERS: I ask to strike out "the office of Hughes Brothers & Bangs;" that is a conclusion.

A. I sent down the board bill to Hughes Brothers and Bangs.

Cross-examination by Mr. MYERS:

I conducted a commissary for Hughes Brothers & Bangs about eighteen years. In 1903 I conducted a commissary. In 1904 I did not. In 1905 and 1906 I did. In 1907 I did not.

Q. Did you conduct a commissary prior to 1903 for them?

A. 1905 and 1906.

By the COURT: In 1903 I conducted a commissary for them. I began work about 1902 or 1903. My bank book cannot tell the moneys that I got from Hughes Brothers & Bangs. I have got my bank book here but it don't show that, don't say that (producing book). That book contains all the moneys that I received in 1903, 1904, 1905 and 1906. I keep an account in the New Haven Bank, First National.

Q. Did you keep any other bank accounts than in the First National Bank of New Haven for 1903, 1904, 1905 and 1906?

60 A. I won't say, I say 1903. In 1904 I kept them there just as well, but I have got another account in Rockland, Maine. I had a commissary there, but not for Hughes Brothers & Bangs. I kept an account other than in the First National Bank in 1905, up there and also in New Haven and in Rockland, Maine. In 1906 I kept a bank account in New Haven. I had interviews with Mr. Bangs, this gentleman sitting here (indicating), concerning the employment of laborers.

Q. Any other conversations than the one you have testified to?

A. That is about work, that is all, conversation. When I got money, I received in checks board bills, but other bills I would be paid it was in cash.

Q. On what ocasions did you get cash?
A. I got cash when I say to the paymaster ——
Q. Give me the time and the amount?
A. I would say, "When you coming up to pay off the men there," and he say, "How much you pay out for over the telephone or telegraph, or anything we need," and I say so much, and I give him the bill and he give me the money, cash.

Mr. MYERS: Objected to as not responsive.

Q. Give me the date that you got your first payment, and the amount?
A. You mean any board bills?

Mr. NORRIS: Objected to on the ground that he does not specify.
The COURT: We will find out.

The WITNESS: The first money we got was in August 27th, 1903. Not that I know I don't receive any money, I don't know how much I got in the month of May, 1903.

61 Q. Didn't you get the sum of $843.25 in the month of May, 1903?
A. Not that I recollect, not in 1903.
Q. What?
A. Not in 1903.
Q. Does your book show any such sum?
A. Here is my book, I cannot see, I do not see any such sum as that. (Examining book.) In June I got deposit, but not anything like this.

I did not get any money from Hughes Brothers & Bangs on the 25th day of May, 1903, nor from Mr. Donovan. I did not get any on the 27th day of May, 1903. I did not deposit on the 27th day of May, 1903, $843.25?

Q. You did not deposit in the First National Bank of New Haven on the 27th day of May, 1903, the sum of $843.25?
The COURT: Did you get it from anybody?
Mr. MYERS: $843.25.
The WITNESS: I could not say; I get money from the different places.

Q. Did you deposit that much money on that day?
A. No, sir. I worked for the city of South Norwalk on the 25th day of May, 1903. I do not remember if I got any payments on the 27th day of June, 1903.

By Mr. MYERS: I made deposits in the month of July, 1903. On the 6th day of July, 1903, I deposited $900. I did not collect $981 on the 27th day of June from Hughes Brothers & Bangs. I did not collect any amount during the month of June from Hughes Brothers & Bangs, and none was paid to me. During the month of August, 1903, I collect $1,239.60.

Q. What are you reading from now?
A. Hey?
62 Q. What are you reading from?
A. What I reading from?

Q. Yes, the paper in your hand?
A. From the book.
Q. What is the paper you took out of your pocket and read from?
A. From the book.

Mr. MYERS: May I be permitted to see the paper, sir?
The COURT: If he permits you, not otherwise.
Mr. MYERS: He has got it in his hands now, sir.
Mr. MORRIS: Your honor, so far as we are concerned, he is at perfect liberty to see it.

The handwriting of the figures on that piece of paper is mine. In the month of August, 1903, I got $1,239.60 from Hughes Brothers & Bangs, by check which I put in the First National Bank of New Haven. The next check that I deposited in the bank that I got from Hughes Brothers & Bangs, was in October of 1903 for $1,589.56. I also got some cash in 1903 from Hughes Brothers & Bangs when I just gave them a bill when I pay out freight, or anything like that.

By the COURT: I paid out money. I have no record of them.
Q. Can you state how much?
A. Just what it was only outside of my pay roll.
Q. I did not ask you that?
A. No, sir.
Q. Have you any way in which you can say how much?
A. No, sir.

By Mr. MYERS: I did not get any money in 1904 from Hughes Brothers & Bangs as I recollect. I was at work at Fairmont,
63 West Virginia, and I kept my account in the First National Bank of New Haven, of the moneys I received from Fairmont, West Virginia. I don't know how much I deposited in the First National Bank of New Haven in 1904 of the moneys I collected from the West Virginia matter; I collect so many places I don't know. May be twelve or fifteen thousand dollars. I could not say how much I collected from Hughes Brothers & Bangs in 1906. I could not say how much I collected in 1905 from Hughes Brothers & Bangs. I don't know how much I collected in 1906 from Hughes Brothers & Bangs. I made deposits in the First National Bank of New Haven, of any moneys I got from Hughes Brothers & Bangs in 1906.

By the COURT: I do not recollect whether on January 9, 1906, I made a deposit that came from Hughes Brothers & Bangs; I have got so many. The book does not show a deposit on or about the 9th of January, 1906.

Mr. MYERS: May I look at the book, sir?
The COURT: It is not in evidence yet.
Mr. MYERS: I want to have it marked for identification.
Mr. NORRIS: No objection whatsoever.
Marked Defendant's Exhibit A for Identification.

NEW YORK, *May* 23, 1910.

64 FRANK P. BARTLETT resumed the stand:

Cross-examination continued by Mr. MYERS:

I first spoke to Mr. Donovan about this question of the wages, about the wages of the workmen at the Sachem's Head Quarry about a week or two before he began. That was in February or March. It was in February when we began to talk about it; in 1903. When he asked me to see Mr. Bangs, that Mr. Bangs was the man to see. I was to see Mr. Bangs to make arrangements about labor; the laborers who were to be employed in the quarry, and to run the quarry; the workmen in the City of New York. I had been superintendent at that quarry before and I knew the kind of work that was to be done about the quarry and about the number of men that were to be employed at different times.

A good many different kinds of work were carried on at the quarry in order to get the stones out. We had a blacksmith shop to sharpen the tools, and required a force for that; I required workmen for that. We did not have any repair shop for scows and a derrick; we sent it to dry dock if it was broke. To make repairs on the scows and the derricks and barges we had regular carpenters around. They were Italian and English.

By the COURT: There was more than one carpenter; sometimes three, sometimes five and sometimes two.

65 By Mr. MYERS: Never a larger number when I was there. In the blacksmith shop we required sometimes four, sometimes six, sometimes two men. These two gangs of men were not employed during the entire season. When I didn't need them I discharged them. Of these men, the carpenters and the blacksmiths, the Americans all had their names. The Italians had numbers. From where the stones were blasted down to the dock we had a track. We pulled the cars with horses. From where I blasted the stone down to the dock some parts may be 500 feet and another way 1,000 feet. There was a rail laid there, with a car to run on it. I had a gang of men to drive the horses and to feed the horses. The tram cars would go right along with the drivers. We had men at the switch. The cars required repairing. The carpenters would generally work around. They would repair the cars.

I certainly had men to attend to repairing the track. It required repairing from time to time. Sometimes the cars required repairing too. They did not require to be almost rebuilt; I don't say that. Car like that we used to put them one side. We had plenty. We had derricks there, large derricks to lift up these stones from where they were blasted and put them on the car, and more derricks on the dock to take the stone from the cars and put them on the scow. They required repairs. They were all done by the same people. One of these workmen, Taylor, had a name and was paid by name, I recall. That was an American. I had one American who was a mechanic—a carpenter.

I don't know what other men were employed on the work
66 by me who had names—Mr. Mayo, the timekeeper. I got
him there and I keep that man there—a timekeeper, that is employed by the order of the company. When I say the company I mean Hughes Brothers & Bangs. There was no other company that I know of. I never heard of another one. I never had anything to do with any other company. I am sure of that. Hughes Brothers & Bangs is referred to as the company. Mr. Donovan did not have a company that I know of. (Mr. Donovan stands up in the court room.) That is the same Mr. Donovan that I have referred to before. I do not know whether he had a company that did any work there. I do not know whether Mr. Hughes had a company who did any work there. The only people who got that work out of the quarry so far as I know, were Hughes Brothers & Bangs. The only people from whom I got any pay was Hughes Brothers & Bangs.

Down to the time that I brought this suit I met only the Breakwater Company. I never worked for the Breakwater Company, but I met them. I did not do any work for them. I got no money from them that I know of. I have got it from Hughes Brothers & Bangs, all of it, as far as I know. All the money that I got came from Hughes Brothers & Bangs as far as I know. Mr. Donovan gave me money for Hughes Brothers & Bangs, but only for Hughes Brothers and Bangs so far as I know.

I got money from Hughes Brothers & Bangs by check and sometimes by cash. I said before that all the money that I got and the checks went for board; that is money to pay me for the supplies that
the men got over at the stores. That is right. I got checks
67 up at No. 1 Madison Avenue. They were for the purpose of paying for what the men got out of the store. Sometimes the check came accompanied with a letter. I left the letters up at Sachem's Head quarry.

The Breakwater Company went there and removed that stuff and burned down all my papers and destroyed them.

By the COURT: I was subpœnaed to produce the letters. I have not brought them. I spoke to Mr. Bangs hundreds of times. The first time I talked to him for that contract was February, 1903. I spoke to him about that contract afterwards a good many times.

After February, 1903, I talked to Mr. Bangs about the wages of the laborers, in March, before I start. I don't know whether I talked to him in April or not. If I met him I generally talked about work. I guess I talked to him in April about the wages of the laborers. I talked to him after April, 1903. After April, 1903, I would keep on talking about the wages all the time that I met him. I don't recollect the time that I say I talked to Mr. Bangs about it. This is six or seven years ago. Any time I would meet him. Sometimes it would be a month or two. Other times I would see him in a week or ten days. Then I would see him in the office. I don't recollect when I spoke to him after April, 1903, about the wages of the laborers. I collected my money.

After April, 1903, I asked him for what was coming to me. I asked him about my money. I was talking to Mr. Bangs
68 about paying me what he owed me. After April, 1903, I just asked for my bill, to pay me what he owed me. This conversation that I had with him about the wages of the laborers was had in the year 1903.

By the COURT: The talk that I had with Bangs about the wages of the laborers took place before the first of May, 1903.

By Mr. MYERS: In February, 1903, I don't know that I saw him. I don't recollect that.

By the COURT: I had talked with him in February, 1903, about organizing the labor of the quarry.

By Mr. MYERS: We would go up there and organize a gang of men to perform that work. I mean by organize, to get laborers to go up there and work taking out those stones in the quarry. Besides that between me and Mr. Bangs at that time the conversation was that I was to go up there and take charge of that work and go ahead and do as I had done before for him. I don't remember any more of the conversation. I can't recollect what I testified here on Friday. A good many things were talked of in February. I don't remember talking with Mr. Bangs in February—what I said. I saw Mr. Bangs in March, 1903, at his office at No. 1 Madison Square, New York City. Besides Mr. Bangs there were present the stenographer and Mr. Donovan.

69 At No. 1 Madison Square in March, 1903, Mr. Bangs told me he was going up there to get ready for the work and fix up the dock and do the best I could to go and when we are ready let him know and telephone and write him now and then whatever I am doing every day.

Mr. Bangs told me to go up there and try to get ready for the work as soon as I could. I went up there and did the best I could. I would come down or telephone down and he said, "Are you ready for to transport any stones yet?" I would tell him when. Then he said "In case I am needed you talk to Mr. Donovan"—and that was all right.

In February or at that time he told me as to the wages of the laborers, to get along then as well as I did before. At that time he told me to make bargains with the laborers as well as I did before and employ laborers and reduce my board bill every month off the pay roll, and the commissary.

Q. Do I understand you to say that Mr. Bangs told you at that time that you should supply the commissary and he would pay you the amount that was due to them?

A. To reduce the labor. And he would take it out of the amount of the labor to pay to me. At that time he left me to make the wages for the laborers. I should make the wages for the men whatever I thought they were worth.

By the COURT: He said to employ laborers and he would reduce my board bill every month by the amount I paid, whatever it was. He would pay me the amount of the commissary each month.

70 By Mr. MYERS: I had no further talk with him about the wages of the laborers after that. Whether that was the last talk I had with him about the wages of the laborers I could not say, I don't remember. He told me he would pay me every month. I talked every time I saw him, asking him for the money that was due me. I don't remember what I said to him other than that. I can't remember now that I had a talk with him after March, 1903, other than to ask him for the amount of the commissary bill. It was in June, July, August, September, every month I would meet him. In June, July, August or September he asked me how I got along and whatever we were doing. That is about all. That is all the conversation that I had with him, as I know.

In June, July, August or September other than to ask him for the amount of the money that was due me, he told me he would get money from the different works and pay me as soon as he could. Cleveland—when he would get his money there, he would come and pay me. The other pay roll, at 39th Street, Brooklyn, he said "You wait a little longer and I will give you money." After March, 1903, he asked me about work and about money. That is about all I had to say to him.

By the COURT: It was about wages and he asked me how I got along; if these men—I don't understand exactly.

By Mr. MYERS: I talked with the men personally who were to go up there and work at the quarry. I had a foreman there.

71 The foreman did not hire some of the men. Nobody hired any men other than myself, that is all. I hired every man that went to work up at the quarry during the year 1903. I hired them in New York City, most of them. May be a few of the men came to work up at the quarry and asked me to be employed there. Whether some of the men who were employed brought other men to work at the quarry I don't know. I don't know that the men at work in the quarry would send for their friends and relatives to come and work there. I did not tell them to do it, not that I know of, not that I remember. Workmen at the quarry would not write to their relatives and friends to come up and work there that I know of. I do not remember that at the quarry there was a big box of brass checks.

The men have brass checks, that I employed, with a number on them sometimes and then they would give it up, we had not got any more. Some men who went to work there were given a brass check with a number on and given a piece of paper sometimes. I hired the men until the job was complete if they will stay; if they don't they can go. They were hired at so much a day. They were paid by the day; we got some paid by the month. Those paid by the month were the timekeeper, the captain of the boat, or any man working on the scows, that go up and down the river. I had the same conversation with every man I hired. He would ask me what kind of work it was what he was going to do.

The men asked me what we were going to do. I said they were going to work in the quarry at Sachem's Head, Connecticut. He said, "How much a day?" I told him from $1.35 up; some

72 would get $1.35 and some would get $1.50; some $1.75; some $2; some $2.25; some $2.50; some $2.75; some $3 and so on. The men who were paid $1.35 a day were the men working cleaning up the quarry with a shovel or pick. I mean when I say cleaning up the quarry, taking away the small stones on the bottom, getting ready for blasting; moving the dirt and sweeping the dirt; that is what I mean by cleaning. The men who got $1.50 a day loaded cars; made a hole in the stone to take them by the derrick, and put them on the car. They loaded stone from the quarry where they blasted, on to the car.

By the COURT: I mean make holes.

By Mr. MYERS: On each side we put a hole in the stone and with a grab hook he would put it on the car. They were employed for loading the cars and the scows; that is one part of the labor.

The men who got $1.75 a day were derrick foremen. The men who got $2.00 a day ran the hoisting machine at the quarry. At the dock may be they got that and may be they got $2.25, or $2.50. The men who were paid $2.50 a day ran the steam drill probably. That is not an engineer, the man who runs the steam drill. The drills were used to make holes to put a charge of dynamite in for blasting. The carpenter was paid $2.75 a day. The blacksmiths were paid, some $2.75, some $3.00. We had some machinists there. I had an assistant make repairs on the derrick and other materials. He was an Italian. He had a number.

73 I went up with the men that I hired. The first time at the City of New York in the month of March I hired about forty men, I guess. When I got up there I gave them a number. Mr. Mayo, the timekeeper, gave the men the number. To see that Mr. Mayo gave a number to the men that I talked to, I would be right along there and I would see it. We began to work up at the quarry around maybe the 4th or 5th of March, I don't remember exactly. All of these men I hired by the day at so much a day, except the mechanics and the time keeper.

By the COURT: And the boat men.

By Mr. MYERS: Mr. Mayo used to give the men the numbers. Sometimes I was there when he gave the men the numbers. I would give him his orders to do so. I told Mr. Mayo to give the men a number. When I hired the next lot of men I could not say. Whenever we need them, as the work was progressing, I came to the City and I know a place where I can get them and I come down and get them, may be Saturday night or whenever I thought it was fit, a rainy day or anything like that.

I have the same talk to everybody I hire. I ask the men to go to work and they ask what kind of work and I explain to them, work at the quarry taking out the stone and bringing them to the breakwater, and loading them on the car and they said, "What wages they would get" and I explained $1.25 and from there up whatever you will be able to do I will pay you.

74 They said, "How can we get along up there." I said, "There is a commissary and you can get all the supplies you want, such as food and clothes or shoes or tobacco or anything laborers usually require." They said, "We have not got any

money," I said, "You don't need any money. When you get there they will give you a check and whatever you buy they punch that amount and you will keep that check and when you get through with the check you come to the commissary and give your number and name and he will give you another one. In that way to the last of the month; then I would reduce this money; the first of the month it will be reduced off your wages and it will be collected." The men would be satisfied to go up there and that is the way we did.

Everything that was said to me by the second batch of men that I hired is what I am now telling you. The men were to go to work at so much a day, and all the supplies they needed could be bought at my commissary, and they would get a card which would enable them to buy whatever they wanted at my commissary, and that would be deducted from their wages, and they would give authority to reduce it; send the bill to Hughes Brothers & Bangs and they would deduct it; not me.

By the COURT: I mean Mr. Bangs would reduce it; at the end of the month they make up the pay roll.

By Mr. MYERS: When I went up there with the second batch of men to see if all the men that I had employed before were
75 there, I had a foreman under me and they would take care, in case I would be away a half a day; I would tell them the day before what they should do to-morrow. Whether the man who received check No. 1 was employed during the whole time I cannot say. There is no way that I can tell the Court and jury how many days the first man, who got check No. 1, stayed on the work, nor can I tell what his name was and what he said to me. I could not say whether the man No. 1 was the same man who had check No. 1 in June, July or September, 1903, because the check changes. If a man goes away we would give the same check to another man; not the same month, but the next month we used the same check again.

I say I hired about 40 men in the month of March. Those 40 men were still working the entire month of March—any day we saw fit, if it was not good weather I might knock them out. Every day some man probably left work; one man is sick and another feels like going away. I don't know.

I was present when Mr. Totli was examined as a witness in Boston. I did not hear him say that he hired men. I didn't stay there. It was quite a small room, but I didn't stay there; I went out. I did not stay through the examination. I do not now remember his having testified that he hired—that he went to New York and hired some of the men. Sometimes he may come down with me and help me bring them up. I don't know whether he did come down sometimes and hire some men or not. When I said that on occasions he came to New York for men, I meant that if he came down I would get a crowd of men, 10 or 12, and I would say "Bring
76 these men up." Totli didn't hire them. The men came to me and wanted to know the condition of the work. I told them the same, about giving me authority to collect wages, that is the first thing, what wages they will get.

By the COURT: I explained to every laborer the same question. That is all that took place.

By Mr. MYERS: What these men had said, it was all understood.

By the COURT: Mr. Bangs gave me orders to do so in the first place. After I had made arrangement I told him that I had.

By Mr. MYERS: I told him something about it after the first time. I had my first agreement in March, 1903, with Mr. Bangs. After that I worked under that agreement repeating the conversation to Mr. Bangs sometimes. Sometimes when labor was scarce it would go up ten cents more. He would ask me such questions, "How is the men?" "Is there plenty of labor?" and so on. To keep any trace of the identity of the men with the numbers they bore I would keep a journal.

What I did so that I can tell that No. 1 continued to be No. 1 during all the other times of the work, for instance, if No. 1 would be discharged that month, nobody else would have that number. I kept the names in the journal opposite the number. Everything came from the store. I gave the men food. I gave some of
77 them drink; sometimes cider or claret. They don't drink much, them people. I sold them clothes. Some of the men had their families there. I gave these men's families tickets on his number. When a man had a family there the workmen would come there and get the supplies there in the store. Sometimes he would get them there and sometimes he would get them outside, because they would not charge any more. Members of the workman's family came there and bought goods, and we have the number of the man; they go together. They will have a family to cook for them.

We made no difference in giving out numbers between the man who repaired the derricks and the man who blasted or fired off the blast; there was no difference in my keeping a record; I treated them all alike, that is, the men who did repairs to the derrick, the man who mended tools and the man who drove horses all treated alike and given a number. I did not keep different accounts for them. We don't send any man to buy up in the country to buy something for the store. The man who did repairs to the tools goes down to the shop; the other man we would give an order, to go to the scow or whatever was ready to do. They were all treated alike. There was no difference in the way I kept the accounts between the man who did repairs and the man who blasted stone, except the one on the boat, you call him captain of the boat and No. 16, captain of such a boat, captain of such a scow. The men on the scow would call them by the number of the scow and the name. Every man who worked on the scow had a name and the number of the scow, so that we would know the difference. Every man who worked in the quarry simply had a number.

78 There was no difference in the way I kept the accounts and the way I presented my accounts, between the men who did the repairing and the men who did the driving and the men who did the blasting. All were treated alike, except the captain of the boat; but the foreman of the carpenters, I would call him Mr. Taylor; I don't say any number; I call them by name. There was one man who touched the battery, to fire off the blast, and another man who was the carpenter and another man who worked at the

blacksmith shop repairing drills. Those were all treated alike and I charged alike, and I presented the bill alike, so that when the bill went to Hughes Brothers & Bangs it had them all included in the bill, and whatever they spent, one month $10 and another $15.

The man who repaired drills at any time, I didn't care what he repaired, I saw his number and I got the name in the journal and I sent it down.

By the COURT: What I got for the men who touched off blasts was mixed in with what I got for the man who did the repairing of tools.

By Mr. MYERS: No distinction; everybody was treated alike. I had somebody to take care of the horses. He had to feed and groom the horses. He was treated the same as the men on the scow; the same as any other laborer. The bill was collected the same way, and added up in the same way and spent in the same way. There was no way I could tell the difference between them, except the wages. I did not present any different bill for them, the hoisting engineer foreman. I put it right there in the book.

79 When the money came from Hughes Brothers & Bangs it came with the general account didn't it?

A. In an envelope; envelope number so and so, or the name; so many days, so much a day, so much board bill; he got that. The next, so much. The company gave it to me in a lump sum. I took the money as I got it and put it in the bank, the pay envelopes of the men.

By the COURT: The men got a charge against them and the balance was in an envelope. The men who got the envelope would get the balance.

By Mr. MYERS: Whether in the month of July I claim that there was $1,539.67 for supplies, if you read the amount correctly, for the men at the quarry, I don't remember. Taking that as an example, I claim for that month there was that amount due me for supplies furnished at the quarry. Whether besides that there was another sum for the men who worked on the scows or barges so that at the end of the month of July I would have a total according to the statement which has been presented to me, of $1,616.36, I don't know.

The COURT: Assume that is the right figure.

The WITNESS: I cannot assume it is the right figure; I don't know.

Assuming that that is the right amount, to get the money from Hughes Brothers & Bangs I asked them for it. It came in checks.

80 By the COURT: The envelopes that I talk about were envelopes with the cash that the men got. The balance above that I charged them, with the commissary; anything that was in the envelope they would get. I would reduce my board bill off of that.

By Mr. MYERS: From time to time I sometimes got checks from Hughes Brothers & Bangs for the board. I did get from time to time checks.

The COURT: He got two.

Mr. MYERS: That is what he has admitted so far.

Those amounts would simply apply on account of what was due me. I say I received two checks of them, from March to November. I have worked for government contractors before. I knew that government contractors have to give bond. I knew that ever since I have been in this business. I knew it may be before I went with Hughes Brothers & Bangs. I knew that any person who wants to get a contract from the government must give a bond. I knew that before I talked to Mr. Bangs about this contract. Mr. Bangs was first behind in making payments to me before this contract.

By the COURT: He was first behind on this contract at the beginning of it, in March, April, May, June.

By Mr. MYERS: He went on piling up. I kept on asking him.

81 Q. What did you do in finding out who was security for Mr. Bangs?

A. I knew because he has got to get bonds.

I don't know that he was behind then—I went to my lawyer directly, this gentleman (pointing to Mr. Norris). That is the first lawyer I consulted. When I first consulted with Mr. Norris about it I don't remember exactly. I have consulted him a couple of years ago about Mr. Bangs being behind in his payments. I don't remember exactly when I consulted him. I first took steps to find out about making the surety pay what Mr. Bangs owed me in 1907. That the United States Fidelity & Guaranty Company was on the bond I read in the papers and I knew it.

By the COURT: I read it in the papers at the time that Mr. Donovan took the contract.

By Mr. MYERS: I don't know that it was Donovan had a contract.

The COURT: Who was the contractor?

Mr. MYERS: Donovan.

That Mr. Donovan got the contract I hear about it. Mr. Donovan did not tell me that he had this contract from Hughes Brothers & Bangs. He did not. Mr. Donovan told me that he would sublet to Hughes Brothers & Bangs. He was subletting to Hughes Brothers & Bangs the Point Judith contract. I didn't look any more for security because I knew Hughes Brothers & Bangs were responsible people. I don't remember exactly how I knew that the

82 United States Fidelity & Guaranty Company was the surety on the bond. I couldn't say I knew that the United States Fidelity & Guaranty Company were on all the bonds that Hughes Brothers & Bangs had and that Mr. Donovan had. I know there was more than one bond, but I don't know that they were on every bond.

Redirect examination by Mr. NORRIS:

I kept books of account at the quarry. My bookkeeper was Alexander Tolli. I produced here in Court portions of books at the request of the attorney for the defendant; whatever I have got; but I have only a few. I could not state to this jury just what any particular laborer purchased during any particular months without looking at a book, only I can say that it was bread or beef. I cannot

state what any particular laborer purchased at the commissary without refreshing my memory from a book.

By the COURT: That is the book that Toffi kept.

By Mr. MYERS: Some of the purchases made by me are in it. That is the number (indicating). This is what they did, right here.

Q. Would the bills that would be sent to Hughes Brothers & Bangs each month be made up from this book?

Mr. MYERS: Objected to as leading and calling for a conclusion. Objection overruled; exception by defendant.

83 A. Yes.

By the COURT:

Q. Did you make up your bill from that book, that you sent to Mr. Bangs?

Same objection, ruling and exception.

A. Yes, this is the memorandum that we sent to Mr. Bangs.

Q. You made them up from that?

A. Yes.

Mr. MYERS: I ask to strike it out because it has not appeared that this witness did it, and in fact it appears on the record what this book is and the witness stating what was done does not import personal knowledge, nor what he did.

Motion denied. Exception by defendant.

By Mr. NORRIS:

Q. What became of your other books?

Mr. MYERS: Objected to as incompetent, irrelevant and immaterial.

Exception overruled. Exception by defendant.

By the COURT: I had other books. I had them up at the commissary's and the company went up there and brought them down and burned down all the books. When I asked for the books; I went up there.

Mr. NORRIS: We have produced all the books we have in our physical custody.

The COURT: You may show where he last had the book.

84 Q. Where was the last time you saw your book other than the ones we have in court?

A. I saw those books I guess last October or last summer sometime, it must be 1909, in Maine. I mean these books. The books other than these that we have produced in court were up at Sachem's Head and they destroyed them.

By the COURT:

Q. When did you last see them?

A. I saw them in 1906 at Sachem's Head, Connecticut.

By Mr. NORRIS: When I went up there I asked Mr. Mayo, the timekeeper.

By the COURT: I had a good many books at the Sachem's Head other than these in Court. They were kept, when I last saw them, last at the commissary. I had an office. That was the place where we have a store and we had a desk. The books in that store were in a box on the shelf. I saw them in 1905 I think. They were still there then. They were left in the boxes, different boxes, all check books. I never saw them after that there. When I went up to work there on this new work I went to the place; it belonged to me.

By Mr. NORRIS: That was in 1905, the same year. I went up to the commissary's place. It was partly standing. The part where the books were was not standing. The roof was off and part
85 of the building was torn down. At the same time they moved the building.

Q. Did you look in the rooms of the building for the books?

A. There was nothing to look in. There was only a few broken boards there.

Q. Did you make a search?

A. I asked the timekeeper, Mr. Mayo; he said that was all destroyed. He said, "I think we don't want to use them any more."

By Mr. MYERS: This other book you show me is the journal 1903. Marked Exhibit 6 for Identification.

The COURT: The book will show between what dates that book is supposed to be a record of.

By the COURT: I made that book (Exhibit 6 for Identification) annexed to the depositions; that is copied from this. That would be the daily book.

Mr. MYERS: I move to strike out the answer.

Motion denied. Exception by defendant.

I had in the force at Sachem's Head between March and December, 1903, sometimes four, sometimes three and sometimes two carpenters. There was only one machinist there, a mechanic, for repairs. There were three or four blacksmiths.

Mr. NORRIS: I will now read the deposition of Alexander Toffi, taken de bene esse.

86 Deposition of Alexander Toffi, taken de bene esse, pursuant to section 863 of the Revised Statutes of the United States, before Robert E. Goodwin, notary public, duly commissioned and qualified to act in and for the county of Suffolk, district of Massachusetts, at his office, 28 State street, Boston, Massachusetts, on Wednesday, March 30th, at 10 o'clock a. m.

All objections of every kind to question and answer are reserved to the trial, to be taken with the same force and effect as though the witness were there sworn and being there orally examined.

ALEXANDER TOFFI, being duly sworn, by the Notary, deposes and says as follows:

"By Mr. NORRIS:

"Q. Mr. Toffi, where do you live?

A. Who, me? Number 11 Warrenton Place—I don't speak very good English—three flights, room 7, Boston, Massachusetts. In 1903 my business was bookkeeper and manager for Mr. F. P. Bartlett at Sachem's Head, Guilford, Connecticut. I commenced to work in the quarry, I guess in September. We started I guess in September. I don't remember very well because it is almost seven years ago, you know. At the time I was in Sachem's Head in 1903 somebody was engaged in building a breakwater. That breakwater was located at Point Judith I guess. We called it Point Judith, you know. I know who was doing the breakwater construction work at Point Judith, Rhode Island, in 1903. They were Hughes Brothers & Bangs. I can tell you very well about how many people working at the
87 Sachem's Head quarry: I think sure 150 to 100 people; I don't know very well, because it is seven years ago, you know. I can tell to you very well how many people were on the breakwater; because down to the breakwater it will be I guess 10 or 15 people, 15 or 16 altogether, I guess. At the Sachem's Head quarry there was a store conducted, commissary store. Mr. F. P. Bartlett conducted the commissary store at Sachem's Head, Connecticut. The men would get their supplies, provisions, meat, groceries, and so forth. It was Mr. F. P. Bartlett. The men, the laboring men, would go to the store. These laborers purchased these supplies at the store and would not pay cash.

Mr. MYERS: The witness, Your Honor, then goes on with a lot of matter. I move to strike it out.

The COURT: "No," is that the response?

Mr. MYERS: That is the response, and then he goes on.

The COURT: Do you want it?

Mr. NORRIS: Yes, I do, your Honor. I will hand it to your Honor and you can see it (handing deposition to Court).

The COURT: I will take that.

Mr. MYERS: Counsel reads it and I will move to strike it out.

The COURT: You can object now and have it overruled and take an exception.

Mr. MYERS: Yes, I will take an exception to anything further than the word "No."

"I have to put down everything in the book, you know, where they come buy, board bill, you know, provisions and the checks just the same you know, because some people they have some families,
88 have a cook, you know, and boarding house, you know, so just the same as boarding house, and the last of the month they pay sometimes ten dollars a month, eleven dollars a month, you know, and I have to put it down, the checks, you know, some provisions, tobacco and something else you know, and we have to make the last of the month, the end of the month they have got to pay, and the last of the month; you understand what I mean?

"Q. Now, can you describe whether any tickets were issued to the men, that is, the laboring men?

"A. Yes.

"Q. Now, around this ticket was what, on the borders of the ticket?
"A. Yes, borders of the ticket
"Q. What was on the ticket?
"A. Well, a dollar ticket.
"Q. And that was composed of a series of amounts which amounted to just one dollar?
"A. Yes."

The COURT: The testimony is so disconnected it is difficult for me to understand what the man means. Go on.

"Q. After a laboring man had used up the ticket which amounted to one dollar?
"A. Yes. If that ticket was the first ticket punched that month, that would be number 1 ticket. After that whole ticket was used up, if he wanted to make other purchases I would issue him another ticket marked number 2. That also contained purchases amounting to one dollar.

Mr. MYERS: Now may I call your attention to that record at that point?

The COURT: Yes.

89 Mr. MYERS (reading): "I am going to object on the trial to leading questions;" so my friend was warned. Your Honor will see these questions are of the most vicious kind that can be.

"Q. At the end of the month how would you total up the amount of purchases each laborer had made during the month?
"A. Yes. I had to put it down in my book, you know, how much they have to pay. I have to put down in my book how much they have to pay for board, for checks, how many dollars they have to pay for board, wherever they board in a family, you know, because the provisions was all just the same as provisions in the store and some of the checks for shoes, pair of pants, tobacco, you know, or provision, so many checks, something for board and for rent, and I have to put it down; sometimes ten, fifteen and twenty dollars the last of the month, that is all.
"Q. And these amounts you would get from the figures that you entered day by day into this book, the amount of the tickets?"

Mr. MYERS: I object to that, sir, on the ground that it is leading.
The COURT: I will allow it.
Exception by defendant.

"A. Yes. Some of these laborers had their families at Sachem's Head, and some of them did not have their families. The people that don't have no family they have to cook there themselves, you see, and they buy macaroni and so forth and they cook themselves. The cook got the supplies to furnish these men with their means from F. P. Bartlett. At the end of the month I would make up a list of the amounts purchased by the laborers. I would give
90 that to Messrs. Hughes Brothers & Bangs.
"Q. That was sent each month to Hughes Brothers & Bangs?

Mr. MYERS: That is another question that is objected to as leading, your Honor.

The COURT: Why did you lead the man so much? Couldn't you have done better than that?

Mr. NORRIS: Your Honor, with those people we would have an interpreter over in Boston. I think so far as that is concerned these amounts are only our books, and a copy of which has been forwarded to Hughes Brothers & Bangs.

The COURT: It seems to me to rather press the matter of leading you pressed it rather far.

Mr. MYERS: And, your Honor, this happened there which my friend does not state. Mr. Bartlett was coaching the witness in Italian, which led to an objection.

Mr. NORRIS: Your Honor, I think that is an absolute falsehood. One of the great admiralty lawyers of Boston was the commissioner, and he would not permit a thing of that kind to be done.

The COURT: That is quite true. I will allow you to do it.

Mr. MYERS: Your Honor has not seen what is coming.

The COURT: So far as it has gone I will allow it.

"A. Yes. Their office was down in New York, the office was down in New York. I don't remember very well the number now. After the last of the month I would keep it sometimes 7, 8, 10 days; sometimes I wait, for them laboring men have to come into the store and see if the board bill is right or not. When
91 everybody was satisfied—'You got so and so to pay?' 'Yes.' 'You have got to pay so and so about a board bill, everything.' He says, 'Yes, all right.' When everybody was satisfied I have to send it down, my board bill down to Hughes Brothers & Bangs.

When somebody have probably got provisions more than the work on the book, Messrs. Hughes Brothers & Bangs have sent to me, say somebody was short, one or two dollars short, they send it to me on a little slip, card or paper, and he send it to me and he says, 'This number is short,' and I have to figure them up in the next month.

The men were designated by numbers and the name.

"Q. On Hughes Brothers & Bangs pay roll how would it appear would there appear numbers or the names of the men?

Mr. MYERS: To that I object, your Honor, what would appear on the pay roll, as against the surety.

The COURT: I will allow that.

Exception by defendant.

"A. Well, Hughes Brothers & Bangs pay roll, I have to use numbers, I don't never use no names, but I have to send down the name too. I would be present when the men were paid off monthly at Sachem's Head, plenty times. Mr. Donovan, I guess, the paymaster, would pay the men. I saw Hughes Brothers & Bangs' pay rolls at Sachem's Head.

I had occasion to go to New York to bring up laborers to Sachem's Head plenty times, I think. Laborers would be going from the

92 quarry during the year 1903. When I would engage these laborers I would tell them that there was a commissary store at Sachem's Head. I would say to them they got to come up to work. You say to me now, when I am in New York?

Plenty times as I get some men for the Sachem's Head quarry they have asked to me, why, what we have up there; I say, 'you come up there and you going to get provisions, if you want them, from our store, and when it is the last of the month all of the provisions you going to put it down in the board bill to Messrs. Hughes Brothers & Bangs, if you are satisfied, and if you are not satisfied don't come at all.' They say 'Yes.' I say, 'If you will come, you people can come,' and they come up there and I have to show the book to them and I say 'We are going'——

I say, 'We are going to make so and so, put it down in the board bill,' and they say, 'That is all right, we are satisfied.' Well, I go right straight along all the time. I don't know any complaint at all from the laboring men. At the end of each month these men then compared the amounts of checks that they got during the month from me with my amount that was to be deducted, that is right. I remember very well the timekeeper, but I don't ever send any time to the company. That would also appear upon the time checks. The timekeeper at the Sachem's Head quarry was Mr. Mayo. He was the timekeeper during the entire time in 1903 when I was there. When I would first engage those laborers in New York I would tell them how much a day they were going to get. If it was a drillman I would say here $2.50, $2.75; if it was a quarryman, $1.75, $1.50, I don't remember very well now, but I told them the wage all the time sure, how much is it, every day, you know.

93 Q. Can you describe how the stone was taken out at Sachem's Head quarry for this breakwater construction at Point Judith?

A. What do you mean, the big stone? The stone was taken out sometimes 15, 16, 17-ton stone, 10, 12, 9, 3-ton stone, and the small stone, too.

These laborers were engaged in some other occupation than working for Hughes Brothers & Bangs. Hughes Brothers & Bangs was the only one those laborers worked for. That is all they did, just quarried out these stone for the breakwater, this stone for the break water, Point Judith. I kept the book of account up there. I can testify from memory the amount each laborer purchased at the store from March 3rd to December, 1903. I can testify from memory. At the time I made these entries in the book they were all correct. (Handing witness book.) This is my book. Those entries in that book are made by me and made by me at the time by my hand.

I call it pay roll book, you know, pay roll; I don't know what you call it for English. I don't understand very well.

Q. This is a book which contains entries, the account of each month?

A. Yes.

Q. The amount which each laborer had purchased during the month?

Mr. MYERS: Your Honor, there is a couple of these leading questions, describing a book. "This is a book which contains entries, the account of each month? A. Yes." I submit, your Honor, both of those questions are objectionable. My friend had ample notice; he is characterizing a book.

94 The COURT: Unless the book gets in it does not make any difference. I will overrule your objection.

Exception by defendant.

A. Yes.

In that book I have numbers of the men and their names. In that book there I have got the number and I have got the name. In this book I don't get no name. The men were designated by numbers, for the quarry.

Q. And that book there is a true account each month of what each laborer purchased at the store?

Mr. MYERS: I submit that question, sir, is pretty well objectionable.

The COURT: Objection overruled.

Mr. MYERS: I object to it as incompetent, irrelevant and immaterial and calling for the contents of the book, and embodying a conclusion.

The COURT: Objection overruled.

Exception by defendant.

A. Yes; that is right.

Q. And from that the bills were sent to Hughes Brothers & Bangs?

Mr. MYERS: The same objection, sir.

The COURT: Objection overruled.

Exception by defendant.

A. Yes, sir.

You ask me to look at March, 1903. All right; I don't have no March.

Adjourned to Tuesday, May 24, 1910, at 10 A. M.

95 NEW YORK, *May* 24, 1910.

Plaintiff's counsel continues reading the deposition of Alexander Toffi, as follows:

Questions 113 to 133 omitted.

That was all for the month of March, 1903.

Q. Now, these men that you have just stated, they were engaged, all of those men were engaged in the quarry?

Mr. MYERS: Objected to as leading.

Objection overruled. Exception by defendant.

A. Yes.

Q. Just look at that slip there. (Indicating yellow slip in book) I have got one right in here. Hughes Brothers & Bangs deducted from number 16 account in March. The difference was $1.31. On

number 28 this is $6.61; the difference was $1.55. For the month it was $2.86.

Q. In other words, the laborers during the month of March purchased——

A. Yes.

Q. Especially numbers 16 and 28, purchased $2.86 worth more of provisions than what they actually earned at the quarry?

Mr. MYERS: Objected to as leading.

The COURT: I think there is a more substantial objection to it than that. It is an objection that goes to the whole method of proof. I understand that you are trying to prove a book kept by plaintiff's bookkeeper and then you are trying to prove corrections made in it. Is that so?

Mr. NORRIS: No, that the books of account kept by Bartlett was kept by Alexander Toffi, the witness whose deposition we are
96 reading. He says they were made in the ordinary course of business; that this book was made from a copy of another book. We have not got that book in our possession. That from that book each month bills—copies of that bill were sent each month to Hughes Brothers & Bangs. Hughes Brothers & Bangs would send back to Bartlett the amount when the laborers had not earned the amount of their purchases, and Bartlett would be stuck for the difference.

The COURT: Is it not true that Toffi said the original book he kept himself?

Mr. NORRIS: Yes.

The COURT: This is proving some of the credits.

Mr. NORRIS: This is by way of giving credit to this bonding company.

The COURT: This is by way of giving credit. I will allow it for that purpose.

Exception by defendant.

A. Yes; $1.31 for number 16 and $1.55 for number 28.

Q. See if we understand each other. The book that you hold in in your hand is a book that you made entries in from time to time, and they are all in your handwriting?

Mr. MYERS: Objected to as leading.

The COURT: I will allow this. You may comment to the jury as to the value of the testimony.

Exception by defendant.

A. Yes.

Q. And it is correct?

Same objection, ruling and exception.

A. Yes.

97 Now after looking in that book. I can testify as to what each laborer purchased during the months during the year 1903 at Sachem's Head if I look in the book. I can't testify if I don't look in the book. This is 7 years ago, I don't remember everything. Now I am chef in a kitchen, and 7 years ago I was book-

keeper for Mr. Bartlett; now I am a chef in a kitchen. I can testify, if I got the book all closed I can testify, but when I get my book open sure I can testify everything. I see my writing and I can read it to you; it is pretty good for an Italian, not very good for English, but for an Italian I got pretty good writing and I can read it to you. I have no independent recollection of any amounts contained in that book, if I don't see the book, no. To testify to the correctness of the amount each laborer purchased I would have to look in the book. Number 9, $5.13. Number 10, $4.30.

The plaintiff offers in evidence board bill book of Frank P. Bartlett at the Sachem's Head quarry, March, 1903, to November, 1903, which is marked, 'Pl'ff's Exhibit A, R. E. G.' by the Notary.

Mr. NORRIS: Part of the stipulation I will read, at the bottom of page 13.

"It is stipulated that the witness would testify in answer to questions propounded by the plaintiff's counsel as to the amount furnished by the plaintiff to the laborers, would read numbers and amounts from the Exhibit 'A', and also the deductions that were made by Hughes Brothers & Bangs, and would also testify in answer to questions propounded by the plaintiff's counsel as to the
98 amounts deducted by Hughes Brothers & Bangs from the store account and the amounts contained in the slips pinned to different pages in Exhibit 'A', said to be deductions made by Hughes Bros. & Bangs which were from the store account, and which slips are hereafter marked severally by the Notary, 'Pl'ff's Ex. B, R. E. G.' 'Pl'ff's Ex. C, R. E. G.', 'Pl'ff's Ex. D, R. E. G.', 'Pl'ff's Ex. E, R. E. G', and 'Pl'ff's Ex. F, R. E. G.'

A. This slip I received from Hughes Brothers & Bangs.

Q. I show you another slip and ask you who you received that from?

Mr. MYERS: Same objection.

Objection overruled. Exception by defendant.

A. I got it from Hughes Brothers & Bangs.

Q. And that also contains the deductions?

Same objection, ruling and exception.

A. Yes.

Q. And corrections made by Hughes Brothers & Bangs?

Same objection, ruling and exception.

A. Yes.

Mr. NORRIS: I will offer that in evidence.

Yellow slip pinned to May account in Exhibit 'A' is marked 'Pl'ff's Ex. C, R. E. G.' by the Notary.

Mr. MYERS: Objected to as not properly proven and not
99 being sufficiently established by the evidence to have been made by any of the firm of Hughes Brothers & Bangs, or by any person authorized to make it.

The COURT: Let me see what the slips really are. They don't seem to be what you say.

Mr. NORRIS: I was trying to take a short cut. I can prove that by another witness, and I will withdraw the offer at present.

The COURT: Then I will allow these slips. They are not precisely admissions, but they are the actual means by which the liability was ascertainable. The creditor makes a claim against the principal and the principal makes certain corrections and says, "No, you are wrong in that," and they eventually agree on what the liability shall be. It is not evidence of the liability, but actually creates the liability. I think the actual obligation was created when they liquidated.

Mr. MYERS: I object. The ground of such a liability is not sustained by the Act of Congress.

Objection overruled. Exception by defendant.

Mr. MYERS: There is no right to recover under this act by pleading accord and satisfaction; therefore the proof is incompetent. So far as it involves a right to bind the surety by admissions between the principal in the bond and the credit. I object to it on that ground. I also object to it on the ground that the paper itself does not contain the statement or admission of the correctness of any account, and is in itself unintelligible and insufficient. And I also object on the ground that there is no proof in the case beyond this declaration of the witness, that he received it from Hughes
100 Brothers & Bangs, as to the authenticity of the paper or the authority of the person who sent it.

Objection overruled. Exception by defendant.

The COURT: This is a change of my ruling yesterday. I ruled these out before.

Mr. NORRIS: Under this ruling I can have the one attached to March and April also marked?

The COURT: Yes.

Yellow slip marked Exhibit No. 7.

Mr. MYERS: I have excepted to your Honor's ruling.

The COURT: Take an objection and exception to all these things that were returned from Hughes Brothers & Bangs. The correction slips are all subject to your objection. The next one is for May. That will be Exhibit 8.

Marked Exhibit 8.

The COURT: I don't see any June and July. There is a white slip. That does not speak for itself. What is the testimony about it?

Mr. NORRIS (reading):

The next month is June. That slip is in Mr. Donovan's handwriting.

Q. Now, turn over to the next one, the month of July. Did you receive a piece of paper at the end of July to correct the pay roll?

Mr. MYERS: I object to the form of the question, being leading, and as characterizing the paper.

Objection overruled. Exception by defendant.

A. Yes.

101 This one is in Mr. Donovan's handwriting. This is for July.

Mr. NORRIS: I offer that in evidence.

The COURT: He does not state where he got it, or when he got it, or from whom he got it. He states that it is in Donovan's handwriting. For aught that appears, Donovan may have scribbled it on a piece of paper for the purpose of estimate.

Mr. NORRIS: That is for July; I will not offer that for the present.

Q. I show you a piece of paper and ask you where did that paper come from?

Mr. MYERS: Same objection.

Objection overruled. Exception by defendant.

A. This one?

Q. Yes.

A. Come from Hughes Brothers & Bangs.

Q. That is a slip covering August and September?

The COURT: Don't read that. You have got in that this slip came from Hughes Brothers & Bangs.

Mr. MORRIS: I offer them in evidence—August and September.

Mr. MYERS: Objected to. There is no proof of the circumstances under which it was delivered, not the time or manner, or the authority of the person who made it, nor that it was in the course of business.

The COURT: I think it was the course of their business. Their business was to admit correction slips.

102 Mr. MYERS: There is no time proved when the paper was delivered, or of the person who made it, or of the authority.

The COURT: Yes, there is proof that it came from the firm, and the proof is that they returned corrections. The date of the instrument is presumptive evidence. I think it is prima facie proof of the account between them. I will take it.

Exception by defendant.

Marked Exhibit 9.

A. We do not have any deduction slips for October and November.

In June, 1903, scow number 18 and scow number 24 was at Point Judith. The scowmen on these scows were charged $5 and $4 respectively, and these men, scowmen of these scows, were depositing stone upon the breakwater.

Q. And got their supplies from the store?

Mr. MYERS: Objected to as leading.

Objection overruled. Exception by defendant.

A. Yes, sir.

I kept separate the scowmen from the laborers because the scowmen, they was off on the breakwater, and they had to keep it separate; I had to keep it separate, because before I have to send down my pay roll I have to wait for the scowmen for them to come down, and they have got to be all separate, because the quarrymen, they

work in the quarry, and the other men was off Point Judith, and I have to wait for the scowmen for them to come back. I also include, then, not only the scowmen and the laborers on the quarry, but also include the men on the breakwater at Point Judith.

103 This book, Plaintiff's Exhibit "A," all the entries therein contained were made by me.

Q. And were made in the course of your business as a bookkeeper?

Mr. MYERS: Objects to as leading.

The COURT: The man who put these questions put every answer in the witness' mouth, and he simply nodded his head. It is embarrassing to say how far that ought to be admitted.

Mr. MYERS: And this in the face of the warning on the record.

The COURT: Yes, in the face of a warning on the record. Ordinarily where that sort of thing is objected to it can be corrected. Have you any other testimony of that? I don't think you ought to go along and put answers in the man's mouth like that, an ignorant man. Have you got any other?

Mr. NORRIS: Your Honor sustains the objection?

The COURT: I don't say that. Have you got any thing better?

Mr. NORRIS: I think so.

The COURT: If you have anything better you better put it in. It is a pretty good rule of evidence to put in the best you have got.

Mr. NORRIS: For the present I will not read those two questions. I cannot testify except from reading the book.

Q. In fact, some time between the first of the month and the tenth of the month, before the bills were sent to Hughes Brothers & Bangs, these men would come in sometime during that time and check up their account?

104 Mr. MYERS: Same objection.

Objection overruled. Exception by defendant.

A. Yes; would come and see everything.

(Placing paper before the witness) That is a time check of Hughes Brothers & Bangs for Sachem's Head Quarry for November 8th, 1903, number 1.

Q. Was that time check cashed in by you?

Mr. MYERS: I object to this testimony on the general ground that there is no proof that that particular time check is for anything that is comprehended within the act. Your Honor reserves that question?

The COURT: Yes.

Exception by defendant.

A. When somebody got a discharge, you know they got the pay right away quick, and Mr. F. P. Bartlett would pay sometimes, sometimes I would pay for him. I would always cash the laborers' time checks who were discharged at the quarry; plenty times I pay because F. P. Bartlett wasn't there; when he was in the store he pay for it, when somebody get a discharge. The word 'deduc-

tions' upon the time check, is the amount purchased from F. P. Bartlett, that is right.

Q. And the amount that you would pay him would be the amount on the last line?

Mr. MYERS: Objected to as leading.

Objection overruled. Exception by defendant.

105 The COURT: The answer is not responsive. Now he goes on and says $7.64 is in his handwriting. I will take that.

Exception by defendant.

"The WITNESS: The deduction is $7.64. This is my writing, and the total is $12.36.

"Q. That would be the amount that would be paid him?

"A. This $12.36.

"Q. That would be the amount paid the laborer?

"A. What we would have to pay for the laborer, pay the laborer, you know, for the company."

Mr. MYERS: The last two questions are within the same ruling of your Honor?

The COURT. You object to them?

Mr. MYERS: Yes.

The COURT: I overrule it.

Mr. MYERS: I except.

Defendant's counsel reads the cross-examination as follows:

"By Mr. MYERS:

I live in Warrenton Place now. I have lived there about 11 months, I guess. I don't know if I am going to move or not. I can't tell to you this question now, if I can move or not. Probably I am going to move, probably not, from number 11 Warrenton place. I am now employed down in Park Square Café, 221 Eliot Street, F. G. May.

106 "(The witness presents card containing the following inscription):

Telephone 21239 Oxford.

F. G. May, L. May, Proprietors.

Park Square Cafe.

Imported and Domestic Beers on Draught.

Ladies and Gents.

245-247 Pleasant Street (Park Square).
221 Eliot Street (Boston, Mass.).

"I don't ever give no name in the cafe because he knows me very well. I got Exhibit 'B' (Ex. 7) from Hughes Brothers & Bangs. I got it by a letter.

To whom was the letter addressed?

A. What? The envelope was addressed to F. P. Bartlett. It came by mail. Part of Exhibit 'C' came by mail, part of it to Mr. Mayo give to me. Part of this Exhibit C (Ex. 8) Mr. Mayo gave to me, and part came by mail. I cannot tell to you now what part of Exhibit C Mr. Mayo give to me because I don't never put it down. Exhibit D (Ex. 10) was given to me by Mr. Donovan. He handed it to me himself; all of this one; all pencil write in it by Mr. Donovan. I put down the ink marks, the cross; yes, I made them; you know when I put down the short for next month I have to put down the ink mark, the cross, for to figure it up one after the other. I didn't put the ink mark on the others because this one was the last one; you see this was the last one. I didn't put down the ink mark opposite number 35 because it is the last one I ever had; I don't ever put down the mark.

107 Why I put some marks down against some and not put marks against others probably I don't ever remember to put down the mark. I got Exhibit E (Ex. 11) (indicating Plaintiff's Exhibit E) from Mr. Donovan. He gave it to me right in the store when it was pay day, at Sachem's Head. Exhibit F (Ex. 9) I probably got from Mr. Mayo, probably I got it from Mr. Mayo because the company sent it to Mr. Mayo, some short. I had some from Hughes Brothers & Bangs, you know. This piece of paper marked Exhibit F I got from Hughes Brothers & Bangs. I don't know who handed it to me. I know the name here, Hughes Brothers & Bangs, and it come from that office. The reason why I say I got it is because I see the envelope, too, I see where it come from. They got a big paper envelope, and they got 'Hughes Brothers & Bangs' on the envelope. This paper, Exhibit F, probably this come by mail to F. B. Bartlett, probably come by mail to the timekeeper and the timekeeper passed it to me.

No, I can't now say what persons, individuals, handed it to me. I don't know what man handed me Exhibit B, this one (indicating Exhibit B). I don't know. I think it is just the same as that. I know Exhibit B come from New York by mail. Exhibit C, that paper probably come by mail to Mr. Mayo, the timekeeper, and the timekeeper passed it to me. I know very well this one because I got it from Mr. Donovan. Exhibit E I got from Mr. Donovan, the paymaster.

I saw men working whose numbers are in this Exhibit A in the quarry. I don't know what they were doing in the quarry. Some had a lot of—what do you call them—blocks, you know, big

108 blocks, stone blocks, you know; some have a big piece of stone, some was drillmen, you know; steam drill, you know, the steam drill. It was in the quarry. The quarry isn't so far from the water. This is the quarry right in here (indicating). Just in 1903 I guess probably the water was—I don't know—50 or 60 feet, probably that. I don't remember because I don't ever measure it. All the men who are given a number in this book, Exhibit A, are workmen in the quarry.

"X Q. Now, was there any breakwater at the quarry?

A. Any breakwater? Breakwater isn't in the quarry. The distance from the breakwater to the quarry, I can't tell you how many miles; I guess 40 or 50 miles, I don't know; I don't know very well. These men did not quarry the stone; the scow come; they work in the stone. They loaded into—what do you call it—in the scow or in the dump—what do you call it—that big scow, the dump scow. When I wrote these numbers and amounts in this book, in Exhibit A (indicating Exhibit A) I got it from another book. I don't know where the other book is. I wrote in the other book. I wrote the number, the name, and the month, just the same as here, in the other book, too, and then I copied this book from that book; sure; I know sure I did. I don't know where is the other one. I don't know who had it. I don't know where is the other book.

X Q. Was anything else written in the other book besides that?

A. What? In the other book, you know, wrote the checks and the board bill, you know, everything. I wrote all provisions in the other book, provisions, board and rent was all in the other book.

This number 1, who got $8.36, as appears by this book, in the other book it showed what that was. I don't ever copy it in
109 this book because—I don't ever copy everything all in this book because I don't have no time to do so, because I have other things to do, and I don't suppose somebody ever call me in court—I call this a court—I don't suppose somebody ever call to me to say am I right about some money that belonged to F. P. Bartlett, you know, through the company, Hughes Brothers & Bangs. I am supposed to do something, I have to do all writing in this book, I put down the number in here and the month. I didn't think it was necessary or that I was required to write down anything more than there is in this book. I thought that was enough. The words 'paid, June 2, 1903,' on the first page of Exhibit A, is my handwriting. Nobody told me to write it. You know this is paid by me; you know what I mean. This is paid on June 2nd, 1903, the amount when I paid the ladies in the kitchen, cooking ladies. The cook ladies, when I paid the ladies, and I put down here, 'paid June 2, 1903,' because I wouldn't remember. I paid them, because I had the orders to pay from Mr. F. P. Bartlett; everything was paid, you see, right in here. These men owed something to the cook for cooking their provisions. They owed for wages to the cook for cooking for them. And they owed for supplies like shoes, boots and things of that kind; we had a check, and then they owed also for provisions for board. Sometimes when we pay a check when somebody gets discharged we have to pay for it, we have to collect the money from the company, you know. But we did not give these men any money. This is only for provision and board and cook ladies, things of that kind; no money in that
110 There is no money in any of those items. No money at all in this book; not in here. I don't know, probably we give sometimes 50 cents or a quarter, I don't know; I don't remember that. There wouldn't be anything of any importance, small amounts. Probably sometimes, you know, somebody say, 'Give me 10 cents,' they are going to shave. I give the money, but it is for Mr. Bartlett all the time, you know, because I was manager;

he gives to me charge to do everything, you know. I know where some of those men are. I don't know where they are now. I don't know any of them because you see I have left the State of Connecticut about 6 years ago; the last time I ever worked down there was Derby, Avenue Hotel in Derby, about 6 or 7 years ago, I guess, and I don't ever see any more people, you know; now, for 5 years I am in Boston you see I guess; let me see in 1905 I come in Boston and I am work all the time here."

Mr. Norris reads the re-direct examination, as follows:

"R. D. Q. And there is no record so far as you know, or did you make any record showing what provisions in detail were purchased, such as shoes, macaroni, or anything else?

A. Well, in the other book, sometime somebody supposed to buy a pair of shoes that cost $1.50, and I put down two checks on the book. In other words, I would only punch the amounts out on this check. The check itself wouldn't show whether shoes were bought or macaroni was bought; it wouldn't appear any place what was purchased, except the amount.

When a man would come in to purchase 10 cents' worth of macaroni, I would punch out the numeral 10. Somebody would
111 buy 5 cents' worth of cheese, I would punch out 5 cents. I don't enter in a book the man's name, 5 cents' worth of cheese; we cashed the checks for accommodation. The stone that was quarried at the quarry would be taken down to the dock and then taken away to the breakwater, but I don't know how many miles it was. These various exhibits that were referred to by Mr. Myers, some of these exhibits came by mail and some of them were handed to me by Mr. Donovan at the quarry; some of them right in here. They were handed to me at the quarry. It is Mr. Donovan's write. That Plaintiff's Exhibit A is a book that was just shown me for the first time to-day. After I left I took no books with me. I don't have no books with me."

The Court: I will take Exhibits D and E now.

Mr. Norris: I will offer them.

Mr. Myers: I object to the reception and take an exception.

The Court: 9 is August and September; June will be 10; July will be 11.

Mr. Norris reads the deposition of John R. Geary, as follows:

"John R. Geary, of lawful age, being by me first duly sworn, deposes and says as follows:

"By Mr. Norris:

I reside at Cleveland, Ohio. I am assistant cashier of the First National Bank. My other occupation is Secretary and Treasurer of the Breakwater Company. I have been such Treasurer and Secretary of the Breakwater Company I should say since about the
112 18th of June, 1908. Prior to my connection with the Breakwater Company I was connected with the Breakwater Construction & Engineering Company. My recollection is that I was only Treasurer of that. I was Treasurer of the Breakwater Construction & Engineering Company, my recollection would be, along

about the latter part of December, 1907. The dates are not firmly fixed in my mind.

As to books that were sent up from New York of the firm of Hughes Brothers & Bangs, or the Federal Contracting Company, to my office at Cleveland, there was a number of books and maps and things of that kind sent out there. I don't know what they are, because I never looked into them. I could not state about how many books there were of Hughes Brothers & Bangs. I never saw the ledgers of Hughes Brothers & Bangs, not that I am aware of. I have no recollection of ever seeing the ledgers of Hughes Brothers & Bangs nor of the Federal Contracting Company.

I think the Breakwater Construction & Engineering Company was put in involuntary bankruptcy some time in March of 1908 and there was a receiver appointed. At the time there was a receiver appointed in the office of the Breakwater Construction & Engineering Company at the Hickox Building, he took possession of everything. I don't know whether or not he removed those books from the office in the Hickox Building. I was not there every day after he took possession, sir. The receiver, Robert C. Morris, continued in his employ two of the several clerks that were formerly in the employ of the Breakwater Construction & Engineering Company. Their names are George E. Feller and Jesse McFarland. They are still in the employ of the Breakwater Company.

113 After the sale by the receiver of the assets of the Breakwater Construction & Engineering Company no books were removed by the purchaser; not that I am aware of. I do not know that the books were in the possession of the Breakwater Construction & Engineering Company, that is, Hughes Brothers & Bangs, or the Federal Contracting Company. I don't know what books you refer to. There was a lot of old papers and stuff of that kind up there, but no books that I know anything about there at all.

"Q. Do you recollect that there were some books of Hughes Brothers & Bangs sent to Cleveland to the Breakwater Construction & Engineering Company?"

The COURT: What is the difference between the Breakwater Construction & Engineering Company, Hughes Brothers & Bangs and the Federal Contracting Company?

Mr. NORRIS: The Breakwater Construction & Engineering Company was placed in involuntary bankruptcy in this District in March, 1908, but as they had certain government contracts of Hughes Brothers & Bangs and of the Federal Contracting Company they were operating those United States contracts.

Mr. MYERS: Hughes Brothers & Bangs were a firm engaged in the contracting business prior to 1902—engaged in the performance of a large number of Federal contracts, and Mr. Donovan was connected with them as a sort of confidential man. In the latter part of 1901 Mr. Hughes died, one of the firm of Hughes Brothers & Bangs—Mr. Eugene Hughes; and thereupon a corporation was formed under the name of the Federal Contracting Company

114 in 1902 to take over the entire business of plant and contracts of Hughes Brothers & Bangs, including the contract which had been obtained by John F. Donovan, practically for his

employers, Hughes Brothers & Bangs; so that when this contract in question was obtained the business theretofore operated by Hughes Brothers & Bangs was then being continued and carried on by the Federal Contracting Company, to whom by deed and the different conveyances, the entire property had been transferred; and in order to avoid or escape the section of the Revised Statutes prohibiting the transfer of government contracts, or of an interest therein, they entered into a stipulation—Mr. Donovan and Hughes Brothers & Bangs, with the Federal Contracting Company—that the Federal Contracting Company should undertake and carry out all these contracts and the original contractor should receive the estimates and turn them over. The Federal Contracting Company, taking up the performance of the contract, found itself, for various reasons, practically required to go out of business in 1901; and one of the large contracts, the New York Harbor Improvement, the Bay Ridge, was transferred to the New Jersey Terminal Company. That company was engaged in dredging the channel. They took over the dredging contract, 25,000,000 yards of earth out of New York harbor, to make a ship canal practically to Sandy Hook. Then in 1905, in October the Breakwater Construction & Engineering Company was incorporated, and it took over from the Federal Contracting Company and Mr. Donovan and Hughes Brothers & Bangs — you know these contracts last for years—all of the breakwater work that was unfinished.

115 The COURT: Including this Point Judith work?

Mr. MYERS: No, the Point Judith work was finished in 1903, and all reserved percentages were paid over; and there were other contracts on the Point Judith extension. The Breakwater Construction & Engineering Company took over the contracts for breakwater work and the New Jersey Terminal took over the Bay Ridge. At that time Hughes Brothers and Bangs still had in their name the Cleveland breakwater and other improvements and Mr. Donovan had some and the Federal Contracting Company had some and the Breakwater Company took over the entire plant, including their real estate and all equipments. In March, 1908, the Breakwater Construction and Engineering Company went the way that the Federal Contracting Company had gone and that Hughes Brothers & Bangs had gone. I omitted to state that there was another corporation formed by Mr. Donovan and Mr. Bangs, the Seacoast Construction Company, and they took up the line, received these contracts and turned over to the Breakwater Construction & Engineering Company those contracts. In 1908 a petition in bankruptcy was filed against the Breakwater Construction & Engineering Company in this District and Robert C. Morris was appointed receiver to take up and carry on, to a point where some other disposition could be made—the contract. It was then that the United States government was interested in having the work on these contracts either resumed or abandoned and many people were interested in having the contract taken up; so Mr. Morris was authorized by Judge Taylor in Ohio, and Judge Holt and Judge Hough in this city,

116 with the consent of the United States Government, to carry on these various contracts. They proceeded under the orders

of the bankruptcy court of this district, with the concurrence of the United States engineer in charge, and the District Attorney in this city, authorized by the government until July, 1908, when a sale was had of all of the property of the Breakwater Construction and Engineering Company to the First National Bank of Cleveland, its principal creditor. This Breakwater Company, the last Company, was organized under the laws of the State of Ohio, and it took its title from the receiver.

The COURT: When they speak of Hughes Brothers & Bangs they really, at the time of this contract, were the Federal Contracting Company?

Mr. MYERS: Yes.

The COURT: And the contract of Donovan was in fact taken by Donovan simply for Hughes Brothers & Bangs.

Mr. MYERS: That is our contention.

Mr. NORRIS: That is not our contention.

The COURT: You do not admit that?

Mr. NORRIS: No.

Mr. MYERS: The First National Bank of Cleveland was the largest creditor, something like $300,000 and it insisted on taking over the entire books and control of the Breakwater Engineering & Construction Company. Its first assistant cashier was made treasurer and its vice-president was made president, and that is how these books got into the possession of the First National Bank.

The COURT: Do you concede that at the time of this contract in the summer and spring of 1903 Hughes Brothers & Bangs had practically assigned all their business to the Federal Contracting Company?

117 Mr. NORRIS: No. In 1903 I think there was a Federal Contracting Company, but they were operated under both, operated as Hughes Brothers & Bangs, as you notice in the time check.

The COURT: What is your position as to the connection of Donovan with Hughes Brothers & Bangs during this time?

Mr. NORRIS: Hughes Brothers & Bangs did the work for John F. Donovan.

The COURT: Is that going to be an issue of consequence?

Mr. NORRIS: I don't know. Under the Supreme Court decision it makes no difference whether it was a subcontract or a contract under which the material and labor was supplied.

The COURT: If you accept their position the laborers were laborers not of the subcontractor but of the principal contractor.

Mr. NORRIS: Yes.

The COURT: I am not aware that it makes any difference.

"A. There was a lot of books, papers and maps, and things like that sent there, but I never went into them, and didn't know what they were. I had the Breakwater books, as they appeared in the Cleveland office, turned over to accountants, but none of the Hughes Brothers & Bangs, or the Federal Contracting Company; not that I am aware of. I have seen the so-called card ledgers since 1907. Whether that is the proper name for them, I don't know. It is a

piece of card board, about four inches long by three deep. I haven't any idea about how many cards there were that I had in my possession; I don't know. Not all of them were alphabetically ar-
118 ranged. I had occasion to look at them yesterday. At the time of my examination I did not find an account of Frank P. Bartlett. I can't state definitely the last time I saw the account of Frank P. Bartlett.

JOHN F. DONOVAN, called as a witness on behalf of the plaintiff, being duly sworn, testifies as follows:

Direct examination by Mr. NORRIS:

I was connected with Hughes Brothers & Bangs. I worked for them from 1891 until 1903 or 1904. I was also connected with the Federal Contracting Company in December, 1903. In the Federal Contrating Company I was first Secretary of that company and later became president of it. I was secretary and treasurer of the Breakwater Construction & Engineering Company. I was president of the Seacoast Company when it was formed. I am second vice-president of the Breakwater Company.

Mr. MYERS: I ask to strike out the answer on the ground that it is not the proper way to prove that he is an officer of the Breakwater Company.

The COURT: Objection overruled.

Mr. MYERS: Exception.

I was the contractor to build the Point Judith Breakwater. I was the president of the Breakwater Company. I am now second vice-president. In February, 1903, I entered into a contract with the United States government; I think it was in February. That was for constructing the breakwater
119 at Point Judith, Rhode Island. At that time I had occasion to visit a Surety Company for the purpose of procuring a bond.

The COURT: Is not the execution of the bond acknowledged?

Mr. MYERS: Yes, sir, it is acknowledged here.

Mr. NORRIS: The plaintiff offers in evidence certified copy of the contract dated February 18, 1903, between John F. Donovan and the United States, and also certified copy of the bond of the United States Fidelity & Guaranty Company, dated February 18, 1903, for the performance of the contract.

Contract referred to by Mr. Norris received in evidence and marked Plaintiff's Exhibit 12.

Bond last referred to by Mr. Norris, received in evidence and marked Plaintiff's Exhibit 13.

Q. Did you personally carry out the work of the Point Judith Breakwater?

Mr. MYERS: Objected to as immaterial and irrelevant.

The COURT: Objection overruled.

Mr. MYERS: Exception.

The WITNESS: —.

The COURT: The answer to that is no.

I had some talk with a member of the firm of Hughes Brothers & Bangs, concerning the contract.

By the COURT:

I have been associated with these people since 1891. In May, 1891, there were several partners associated in the firm, four. They were James Hughes, Eugene Hughes, Charles Hughes and Anson M. Bangs. Two of them died by the first of January, 1903, Mr. Bangs and James Hughes. I continued in the employ of the firm. I continued in their employ, and later in the Federal Contracting Company which they formed. I was first aware of the existence of the company during the winter of 1902 or of the first part of 1903, in process of formation. I learned of the existence at the time; it was only in process of formation at that time. When it was completed I don't know; I became secretary of it in December, 1903; was a director all the time. Mr. Bangs and I had several conversations in the fall of 1902, when the work was first advertised, and it came up for letting. I was in the office all the time, and we talked it over in a general way, the contract. I was at that time on a salary with Hughes Brothers & Bangs; in the fall of 1902. These took place at the office of, I think it was, No. 1 Madison Avenue, or either 5 Nassau Street; I cannot recall the exact dates now.

By Mr. NORRIS:

We saw the contract at Point Judith, we found the contract at Point Judith was advertised to be let, the work was to be performed there and I went—I told them that we were going to work over there, and for sometime I was well acquainted in that work, and it was decided that I should do the work, and Hughes Brothers & Bangs should carry on the contract, and I do not recall that was at any one conversation. We had several talks; I met him every day, and was in the office with him all the time, and the general purport of it was that I was to take the contract; and in future conversations they would go on and do the work with the understanding that when this Federal Contracting Company was properly formed—this is part of the conversation—

By the COURT: I can state a little closer the form of the conversation, as to what they said. There was something said about profits, or who should get them, if there were any. It was understood that I was to turn the checks over to Hughes Brothers & Bangs, and in consideration of that I was to be still retained by them and acting in the capacity of confidential man, as I had for some years been doing, and to receive a certain amount of stock and to be elected an officer of the Federal Contracting Company when it was properly formed. Nothing was said about what should be done to the contract after the Federal Contracting Company was formed.

The WITNESS: That was about the conversation that I was to have an interest in this company. I was to turn over all the checks I got

from the government and Hughes Brothers & Bangs were to do all the work and make all the payments. I was to receive a salary which I had at that time, and also to be made a secretary of the other company. There was nothing said about transferring the contract to the other company; it could not be transferred; I should deliver the checks to Hughes Brothers & Bangs. It is possible that some of them were delivered later, endorsed by the Federal. I had no written agreement with Mr. Bangs or with the Federal as to this; it was all verbal.

122 By Mr. NORRIS: As a matter of fact, as estimates were received from the government for the Point Judith work I turned over these checks received from the government to Hughes Brothers & Bangs, immediately endorsed them. I recall the plaintiff, Frank P. Bartlett. I think I saw him first in 1893, or 1894, in Sault Ste. Marie, Michigan. After eighteen years it is pretty hard to say.

After this contract was awarded to me Bartlett came to see me—The contract was awarded in January or February, 1903——

Q. What was the exact date?

Mr. NORRIS: February 18, 1903.

The WITNESS: It was right after that immediately that that contract was awarded, within a few days or weeks. Bartlett, whom I had known for sometime, called to see me with reference to running a commissary——

Mr. MYERS: I object to any conversation between this witness and Mr. Bartlett.

Mr. NORRIS: If the Court please, we allege this in our complaint as to the contract.

The COURT: I will take it.

Mr. MYERS: Objected to as incompetent, irrevelant and immaterial.

The COURT: Objection overruled.

Mr. MYERS: Exception.

By the COURT: He saw me at No. 1 Madison Avenue; if the office was at No. 1 Madison Avenue; I assume that it was either there or at No. 5 Nassau Street.

Q. You may state what was said between you.

123 Mr. MYERS: I may have an objection and exception, if your Honor please.

The COURT: Yes.

The WITNESS: He said he would like to take up the question of furnishing labor and handling the commissary and furnishing supplies to the men at the quarry, and he understood I had received the contract. I told him that while I had received the contract it was awarded to me and that Hughes Brothers & Bangs were going to carry on the work, and I would have to talk the matter over with Mr. Bangs and go into the matter as to whether he was willing or not; that I was to have practical charge of that eastern work and that it was necessary to talk it over with Mr. Bangs and see what sort of a proposition we could make with Bartlett, and what we could do

about it. I talked with Mr. Bangs, I am not sure that I talked with him in Bartlett's presence, but he came back after a few days and wanted to know what we were going to do, and I told him it was all right, that we would let him run the commissary, and that he should furnish us each month a list of the men, the amounts of money their accounts amounted to at the store, and that he would arrange to have the amount so assigned by the men deducted from the pay roll when it was sent in by our timekeeper, and that if any men bought more than their account showed, we would not be responsible. In other words, if a man only worked four or five days and Bartlett allowed him to run up $20 worth, we would not be responsible for it. That was about the conversation that I had with him at that time; and I talked with him and made the arrangement with him on the understanding—And on that basis he started in to furnish the
124 supplies and men for the commissary store. It was also arranged that he was to get us men.

Mr. MYERS: I object to that.
The COURT: I will let that stand.
Mr. MYERS: Exception.

By Mr. MYERS: Mr. Bartlett called at the office frequently until we were ready to begin operating our works at Sachem's Head. I have been present with Mr. Bartlett when he went to recruit these men for the quarry; I don't know on how many occasions; once or twice I recall that he called me up from somewhere, Mulberry Street or Bleecker Street, and said he was getting men and that it was hard to get them and he wanted some one to verify his statement as to how they would run the commissary, or something of that kind, and I have on occasions gone with him to Bertini's on Bleecker Street and other places, and stated practically what he told the men.

Between March and November 8, 1903, I presume I visited the quarry three and four times a month, and sometimes oftener. I can describe to the jury what particular work these various laborers did at the quarry. Simply to work, a process of getting out stone and furnishing it and depositing it in this breakwater, and for that purpose we have a quarry where the holes were drilled and the stone was blasted and taken on cars down to the dock and placed aboard scows; that was the general work that was done in the quarry. In connection with it we had not only quarry men, but men looking after the hoisting of the stone deposited on the dock on to these scows. We also had powder men to see that the blasts were put in properly;
125 men to touch off the batteries to blast the stone, and we had to have a few men making necessary repairs; we had to have one or two blacksmiths, I don't know how many, to make repairs to chains, to make whatever necessary repairs to the machine work, or anything pertaining to the machinery; also had to have men at the docks to see about loading the scows, trimming the scows, as it is called; also had a few men on the breakwater work, to see that it was unloaded properly, what we call derrick riggers to handle the chains, etc., to see that the stone was properly deposited. Also had to have

quarry foremen handling gangs of eight or ten men in those various derricks.

Q. Now, what were the duties of the blacksmith?

A. He was there to make whatever repairs were necessary in case any little thing broke about a car or derrick, or chains on the scows, but most of the particular duties, as I recall, kept them busy sharpening drills, more of that than anything else.

By the Court: For the purpose of drilling the rock so that the proper blast could be put in them. The carpenter was there to make whatever repairs that might be necessary. Oftentimes stone would fall on a flat car, and that was one of our greatest—most of the work he did was fixing up those flat cars, fixing up a scow in case anything happened to it. Those repairs were more or less temporary, and in case a scow was damaged too much I would send that up to the shipping yard, to a dry dock, and then pull it out and repair it. The machinist, as we called him, or as I recall, they called him
126 the master mechanic—his business, in case anything happened to the engine or the boiler, or something, that the ordinary men in the quarry did not understand or could not fix, to see that it was properly put in shape or fixed, to see that it was taken into the machine shop if it was a wheel or something of that kind, and he would take it to the machine shop and see that it was attended to. The balance of the men at the quarry consisted of ordinary laborers and quarry men; they were the largest part of it. All those various people were in the employ of Hughes Brothers & Bangs.

The stone that was quarried at the quarry at Sachem's Head, Connecticut, went to the breakwater at Point Judith. No other stone went to any other place; it was all quarried that year. Hughes Brothers & Bangs did not, to my knowledge, during 1903 at Sachem's Head, Connecticut, sell any stone to anybody. At the breakwater there were usually, I think, not more than eight to ten men present when the scow came there. Of course there would be more around there. Actually engaged on the work, usually eight or ten men engaged on the stone placing it.

Their duties consisted of unloading the scow and placing the stone in the proper place by dumping the scow to let it go into the water. The government inspector was stationed out there.

During the year 1903 my position with Hughes Brothers & Bangs was confidential man in charge of the office, looking after the New York office, looking after the paying of the men on the eastern work, and in addition to visiting the quarry to see that this particular work
127 was carried on properly, and in a confidential capacity for them. I also had charge of the payrolls and of the books; that was one of my duties.

At the end of each month, as soon after as it was possible, the time sheets would be sent in first by our quarry from the timekeeper; the quarry would send in the time sheets. This time sheet had the time of the men and the wages and the amount was figured and there was a column left for deductions, which deductions—it was simply marked deductions. We did that every month. About the 8th or the 10th of the month, or at least the store, Bartlett would send in

the list of the amounts of money, the amount of goods purchased by these various men——

Mr. MYERS: That I object to.
The COURT: Objection overruled.
Mr. MYERS: Exception.

The WITNESS (continuing): And we would receive it then by mail at the office. When these were received in the office I would take them and commence deducting on the payroll from these various numbers. I did not know these Italians by name, simply by numbers, and his board bill or the store account was simply sent in by numbers. In case a man did not have enough coming to him on the payroll to deduct the full amount, I would then make an entry on a little slip in order to notify Bartlett or the store that this man did not have enough money coming to him. His deductions would be made and the net amount on the payroll carried out and the money would be gotten from the bank to be put in the envelopes and each envelope would state the number of days the amount of deduction and the store account, and the net amount. These envelopes
I would take to the quarry on one of my visits there and pay
128 off the men. Exhibit No. 7 is one that was made up in typewriting by Mr. Irwin, my assistant. I either took this with me when I took the payroll or mailed it.

The COURT: Now, look at the others there?

The WITNESS: That is my handwriting (indicating). July is not my handwriting. Exhibit 7 is one of those slips. Exhibit 8, Exhibit 10, Exhibit 11, Exhibit 9.

By the COURT: That carries me up to September. I do not recall whether there were any deduction slips later; I do not see any here. I cannot state that there were no deductions to be made for subsequent months. It is so long ago. That is the general way it was carried on and sent to him.

By Mr. NORRIS:

Q. Was a separate account kept of Mr. Bartlett's account, expenses, freight, etc?
A. Yes, sir.

Mr. MYERS: That I object to.
The COURT: Objection overruled.
Mr. MYERS: Exception.

The WITNESS: Yes, we kept a separate account for various items of freight that some one had to pay. They did not appear upon the pay roll; separately. The F. P. Bartlett account was kept on what we call the card ledgers. A series of cards of these various accounts on which I entered the credits and charges, whatever amounts were sent to me, checks.

129 By the COURT:

We kept an account that year on the card ledger, and we might have kept a store account in the books; I do not know now; I do not

remember. There was no money paid for the amounts which were deducted.

Mr. M[illegible]: The question is whether he knows.

The Court: He does not know.

By Mr. Norris:

I went down to see Mr. Sullivan, the manager of their company in New York City and told him I wanted to see him about getting a bond for his contract. The bond was $15,000. I had known him for some time, and he had known me in connection with Hughes Brothers & Bangs matters. He said I guess we can furnish you a bond. Are you going to do the work? I said, no; that Hughes Brothers & Bangs were going to do the work, that they are going to do the work; he said, "All right, we will go on the bond," and the bond was furnished.

Mr. Norris: Mr. Myers, have you any of the bills that were sent by Bartlett to Hughes Brothers & Bangs?

Mr. Myers: We have no such bills; never had any such bills.

Mr. Norris: Have you any books or any card ledgers?

Mr. Myers: We have not anything.

Mr. Norris: The plaintiff offers in evidence the notice to produce, with admissions of service.

The Court: We do not need that to go in evidence. That is not the proper part of the evidence in the case.

130 I can remember any given bill, any one bill, without refreshing my recollection, within a few dollars, I can. Exact pennies, I cannot, I do not carry them in my head. It is simply a remembrance of mine from doing business there and handling the accounts. It was I that generaly made up the payrolls of Hughes Brothers & Bangs. I think that year I made up all of them; possibly Mr. Irwin might have assisted me. I physically paid the men at the quarry; always did that; I always went over there with the money.

Q. Where was the last time you saw the bills of Frank P. Bartlett?

A. I don't know just what bills you refer to. The monthly bills sent in by Bartlett were stored in our office at 225 Fifth Avenue; they were there until the office was moved sometime in,—until the office was moved in 1908.

Q. And where were they moved to?

Mr. Myers: Objected to unless the witness was present when they were taken.

The Court: I will allow him to state where the office was moved to.

Mr. Myers: I take an exception.

A. I knew who the bookkeeper of Mr. Bartlett was. His name was Toffi. During the year 1903 a demand was made upon me by Bartlett for the payment of these moneys. Whenever I went to the quarry he asked me about his check. I told him we would do the best we could and would get around to it and pay him as fast as we

could. We did pay him something; I do not recall what it was now. I know we made some payments to Bartlett during the year 1903.

131 By the COURT:

Two or three, I imagine; I do not know just the exact amount or time. We made him a few payments, I think, in 1903, during that year. When I made a payment to him I then charged it to him on the car ledger. I can give the contents of that car ledger; I cannot give the exact amounts.

I do not recall it. $9,000, or $10,000, or something of that kind. He did work there for six months, and the bills ran, I suppose, fifteen or eighteen hundred dollars a month; would be about $10,000 or $12,000. That is as near as I can recall. I know that from the amount of money we had and the amount of work we did.

Recess until 2 p. m.

Cross-examination by Mr. MYERS:

I live at 701 West 179th Street. I have no office in this city; I have desk room in the city, in an office. I have a desk in Mr. Norris', the plaintiff's attorney's office whenever I care to go there. I have had a desk room in his office I think since the time the Breakwater Company came from Philadelphia. By the Breakwater Company I mean the present company that is carrying on these government contracts. That company has an office in Philadelphia and I have a desk room in an office. I had been with the firm of Hughes Brothers & Bangs for some years prior to 1903; for twelve years, I think. That firm at first consisted of Mr. Charles Hughes, Eugene Hughes and Anson M. Bangs. Then I understand Mr. Charles Hughes died and Eugene Hughes died and James Hughes died and Anson M. Bangs is now the sole survivor of that firm.

132 Q. Now, did the firm of the four members named have any contract outstanding, several contracts outstanding in January, 1902?

A. Just a minute. You asked if the firm of Hughes Brothers & Bangs had a contract?

Q. Yes. Just give me an answer.

A. You want to know where?

Q. Yes?

A. In Cleveland, Ohio, and New York harbor. Three of the members of the firm were living in December, 1902, when we had the Cleveland Breakwater contract and the New York Harbor Improvement contract. In the fall of 1902, December or November, Anson M. Bangs, Eugene Hughes and James Hughes were living at that time. Mr. Eugene Hughes died in December, 1902, about. A corporation which I have called the Federal Contracting Company was then in process of formation.

Q. That corporation when formed was to take over the entire plant of Hughes Brothers & Bangs, was it not, as far as you know?

A. I do not think it is proper for me to state. I was the confidential man for them. A corporation was in process of formation

in December, 1902, in the office of Kellogg & Rose. That corporation was organized, as far as I know, sometime in—I do not recall; late in 1902 or early in 1903. I know, of course, the signatures of Anson M. Bangs and James Hughes. The signatures which you show me for the purpose of refreshing my recollection (showing witness), I should say they were the signatures, as far as I can remember. I noticed the date of that paper (showing witness). It is the 27th day of January, 1903.

Mr. MYERS: I offer it in evidence.

133 Paper referred to received in evidence and marked Defendant's Exhibit B, and read to the jury.

At that time I was the confidential man of Hughes Brothers & Bangs. I knew about the formation of the corporation and the transferring of the business just in a general way; I was not a party to it; I was not a member of the firm. I know whether the business of the old contracts was thereafter continued by the Federal Contracting Company—if Hughes Brothers & Bangs carried on all the old contracts. I knew it. I think there was a transfer of the plant and property, transferring from Hughes Brothers & Bangs to the Federal Contracting Company. I think the quarries and the real estate were conveyed by deed to the Federal Contracting Company, and the personal property was also conveyed. I think the personal property was assigned and transferred likewise. I understood they were, but not being a member of the firm I cannot swear to it. I understand that the Federal Contracting Company in March, 1903, gave a deed of all of this property that was transferred. I do not recall the bank. At that time I did not have any plant of my own. In 1903 I did not own any plant of any kind which would enable me to carry out any contract. I secured the contract in my name, yes, sir. I do not recall whether the understanding between myself and Hughes Brothers & Bangs was made previous to my securing the contract, or when it was awarded. I said the contract was awarded or when it was awarded I had an understanding with Mr. Bangs. Whatever testimony I have stated, it was about that time, the fall of 1902, or early in 1903. I talked over with Mr. Bangs the

134 fact that the government proposed to have work done at Point Judith. It was understood that they, Hughes Brothers & Bangs, were to handle that contract in case I got the work. There was to be no interest for me except what I stated this morning. I stated this morning that I was to receive an interest in the Federal Contracting Company that was then in process of formation, and I was to be secretary of the company, and they were to do all this work in consideration of my signing or endorsing all these checks. I do not recall that there was any agreement made as to what the Federal Contracting Company was to do with this contract after it was awarded to me.

I remember stating when this contract was to be let by the United States government, and I was to bid on it. I don't recall that I stated it was to be transferred; it was a verbal talk that somebody else was to execute the contract other than myself, and I was to receive checks and turn over to some one else.

At that time Hughes Brothers & Bangs had under consideration the formation of a corporation to which corporation their entire undertakings were to be transferred. I assume this contract was to enter into that arrangement, although I do not think it was specifically stated, but I assumed, and it was taken for granted that this contract formed a part of the general arrangement, whenever the Federal went on with the work.

After having looked at the paper, Exhibit B, I think the Federal Contracting Company was incorporated prior to January 17, 1903. The contract was executed and then the question was taken up with me and Mr. Bangs about completing or performing the
135 contract. I do not recall what office Mr. Bangs occupied in the Federal Contracting Company. At that time if I can explain—I don't remember. I can explain it. I don't remember. I remember some of the officers of the Federal Contracting Company. I don't remember exactly. I remember when it was formed. It was formed in the attorneys' office, Kellogg & Rose; as to what date it was transferred, or when Mr. Bangs became president of the company, I do not know now. He was the first president of the company, after it left the lawyer's hands.

Any Federal Contracting Company checks were signed by Mr. Bangs as president and James Hughes, Treasurer, and Hughes Brothers & Bangs, by Mr. Bangs, or any of the firm in fact. I had charge of the books. I had charge of making entries in the books. Mr. Bangs signed all checks with Mr. Hughes' signature on as to the Federal checks.

After the Federal was formed the payments were then directed by Mr. Bangs. Whenever I stated an account was correct, Mr. Bangs would sign the check and Mr. Hughes would also leave checks with his signature, directing payment to be made. There was a difference between Hughes Brothers & Bangs checks and the Federal checks. Mr. Bangs was still the active manager and head of the two concerns. The first conversation I had with any person with regard to opening the Sachem's Head quarry, after the contract was awarded, I do not recall, excepting the statement I made this morning on direct-examination. I said early in 1903, if I recall, I was talking with him every day or two about it. At that time the quarry was not in operation.

136 Mr. Bangs and I had in contemplation two quarries that were to supply the stone for the Point Judith Breakwater; one out of which the government had already accepted the stone on a previous contract, and also Sachem's Head quarry. Sachem's Head quarry is near Guilford, in the State of Connecticut, and the proposed improvement was at Point Judith, Rhode Island, between fifty and sixty miles distant by water transportation. I believe it is called.

At the time I had my first conversation with Mr. Bartlett, I think the quarry was closed. Mr. Bartlett came to me to get the matter of supplying any workmen with provisions, running the commissary stores.

When I had my first talk with him, other than to supplying the provisions of running the commissary, I don't think at that time

there was anything said about his employment as superintendent. I don't know when it was that the question of employing him as superintendent arose. I think he took that up with Mr. Bangs; I do not think that was entered into with me. The matter that was taken up with me was the opening and the running of the commissary at the Sachem's Head quarry, which I referred to Mr. Bangs. I stated this morning, and I can tell it to you again. I simply told Mr. Bartlett that I had a contract, or that the contract was in my name, but that Hughes Brothers & Bangs were to do the work and carry on the work, because they had a plant and property and had done the work before, and I would take the matter of running the commissary up with Mr. Bangs, as far as I was concerned it would probably be all right to have him go there; it was something
137 of that kind; I do not remember the exact words. There might have been something else that I can't recall at that time. Mr. Bartlett and I were talking every few days. It was seven years ago, and I cannot remember what else was said.

The WITNESS: I recall nothing else, except that Bartlett had in the past supplied us with labor and knew where to get the men, and we wanted him to see what he could do about getting men and getting the quarry open and starting this work.

I didn't say that Mr. Bartlett knew what men would be required for the full operation of the quarry. I don't know whether Mr. Bartlett knew what men were required for the full operation of the quarry. He was supposed to know when he needed men. He was to get what men he could.

The men required in the quarry that Mr. Bartlett was not to get, were the timekeeper; he had a master mechanic; I think we had some building work at that time, as I recall. Of course, Mr. Bangs would have to get whoever he would engage from the docks. Of course, Bartlett would have nothing to do with that, because if we chartered a tug they had men already aboard the boat.

The WITNESS: That means the whole crew of the tug; he would have nothing to do with that. Then, I should say, excepting the timekeeper, the superintendent and the men on the docks, and possibly the Master Mechanic, it was left to Mr. Bartlett to get all the other men to run the quarry. For those men he asked the privilege of supplying the provisions from the commissary at Sachem's Head; he had done so before. The wages for all those men that I have mentioned excepting the superintendent, timekeeper, the men on the docks and the master mechanic, were fixed in a gen-
138 eral talk in the office; Mr. Bangs and myself would talk that over in the office. It was left to Mr. Bangs and myself o fix and arrange the wages of all those men, excepting those four hat I have mentioned. Sometimes I fixed the pay of the laborers fter talking with Mr. Bangs. At times when I have been to the uarry I have had that privilege of interviewing those men who orked at the quarry and fixing the pay of them.

Before the men went to work at the quarry I fixed the pay of the rillers, powder men—but not directly with them. Bartlett was old to do that. Bartlett was told to hire them, find them and fix

their rate of wages up to a certain point; up to the point that I agreed that should be paid. I guess we all fixed the number of men that were to go there. A part of that was left to Mr. Bartlett when he became superintendent; I don't remember the date. I think he was to supply and see that the quarry had a complete running complement of men; that is my recollection.

Before he became superintendent the number of men was all talked over between Mr. Bangs, Bartlett and myself. After he became superintendent he still had charge of it; he had charge of looking after that end of it.

Before Bartlett went up to the quarry to take charge of it the first time, I cannot recall who was there early in 1903; I should be very glad to, but I cannot.

Mr. Bartlett had the right of supplying everybody who worked on the quarry with provisions, as far as they were willing to buy from him; unless they wanted to walk to Guilford, the nearest town to buy it; they could do that. Mr. Bartlett had the right and
139 sole privileges from the Federal Contracting Company and Hughes Brothers & Bangs of supplying the men who worked in the quarry with provisions, providing he did not overcharge and kept down the prices, and, so far as I was advised, he did supply their wants of goods from his store.

At the end of the month he sent a statement to my company showing the exact value of the merchandise that he had furnished the men; a statement was made from his store to us in New York. That did not contain a complete list as far as all the men that worked there and who received goods from him under this arrangement. These men were omitted from that list. I think in that year we had a master mechanic named —— ——. I am not positive, but I think we had a master mechanic named Wilkin, and a carpenter named Taylor—this is only my recollection—who bought goods, and Mayo, the timekeeper.

With the exception of those three that I have named and the Superintendent at the Breakwater, Captain Dill at that time, all the other men worked in the quarry were given on this list that was sent to me.

Captain Dill was not in command of one of the tugs; he was in charge at the Breakwater; he was not in charge of the quarry,—he was unloading stone at the breakwater. That was at Point Judith.

Whether there was anyone else other than the master mechanic, the carpenter, Mr. Taylor, Mayo, the timekeeper and Captain Dill, the superintendent and Captain of the tugs at the quarry whose name does not appear, or either whose name did not appear or whose number did not appear on this list that was transmitted to
140 the company, I cannot remember just now. I cannot say that I do know of any that was, unless Bartlett allowed some men to buy there without sending in their list, or having it deducted from their money.

I was here part of the time Mr. Bartlett was examined; I am not sure that I was here all of the time or not; I was here all day yesterday, and yesterday afternoon.

The larger part of these men, almost all of the men, had simply

a number on the payroll. The men at the Breakwater went by name on the payroll, except all the men who were employed on the scows that transferred the stone from the dock at Sachem's Head to the Breakwater. The men employed at the Breakwater went by name.

Some of the men on the tug and on the scows also purchased provisions, as far as I was told by Mr. Bartlett. When they started in there may have been forty or fifty at work at this quarry in 1903 at any one time. The maximum number employed at the quarry, I should say to the best of my recollection now, from 130 to 150, working there at one time, in the different pursuits and occupations incident to the operation of the quarry, from the master mechanic right down to the driver of the team, if there was a driver; I am not sure about that at this time; we had a horse, I remember,—yes, possibly two.

We had a blacksmith shop there; we had a blacksmith shop for the purpose of making such repairs and the sharpening of drills and tools as became necessary on the premises. We had a carpenter, not a carpenter shop, exactly. I don't think we had what would be called a carpenter shop; we had two or three carpenters probably and sometimes more.

141 There were quarters there provided for the men; there was some building there, what we called "shanties." I don't recall who attended to keeping them in repair. There was always a discussion as to that, who owned the buildings, Bartlett or the company.

I don't know whether he had carpenters or mechanics employed there to attend to that matter, too. Bartlett always claimed he did, and some of our men claimed the same. I don't know that we made any repairs in that year; I don't think we did.

Q. No recollection as to any discussion about repairs or who paid for them?

A. I am not sure whether it was the next contract in 1905 or this one, which came two years later; there was a lot of discussion.

Mr. MYERS: I move to strike that out.
The COURT: Motion denied.
Mr. MYERS: Exception.

We had cars there to carry and transport the stone from where it was blasted down to the dock, little flat cars. They were what we called—they ran by gravity; the quarry is slightly inclined there, and we used to pull the cars out from the quarry and allow the cars to run down. They were pulled up by horses and were allowed to run down by gravity, when they were loaded.

I stated that at that time there may have been two or three horses used there.

I could not recall who provided the feed and care of the horses, but Bartlett bought some horses himself at that time and I think we paid for them.

I cannot answer who hired the men who took care of them.

142 If the horses were on the payroll as such the driver would also be on and paid for by the company. The horses had

numbers; we would have the number of the horse and the driver, so much per day.

To the best of my knowledge, we had number so and so, for instance, No. 120, horse and driver, $2.50 a day, whatever it may be on the payroll. I think the men who owned the horses would supply the feed. If a man who owned a horse furnished the driver, and, say, $2.50 a day was the rate at that time, he was receiving that envelope at the time when I went over, and the man with the horse would step up and get his envelope. And there were also men employed there who attended to drilling the holes in the rock preparatory to the blast. These men appeared on the payroll transmitted to me by Mr. Mayo, our timekeeper. I assume those were the men hired by Mr. Bartlett.

There were men also on derricks; derricks that were right in the quarry where the stone was blasted and put it on the traincar. The derricks were on the ground.

There were one or two other sets of derricks down at the wharf; there were separate crews for each of these derricks; there were a number of quarrymen working in these derricks handling the stone. I recall there were anywhere from six to nine derricks in the quarry at that time.

We had powder and explosives at the quarry and at a place where those explosives were kept. There was a man there who had charge of them; one man called the powder man. He was on the payroll; he had a number. I don't recall whether at this time he was
143 an Italian or not, what nationality he was; but he appeared by a number on the payroll.

There were a few men who were attending to cleaning of the quarry and removing the debris, what is called the stripping to get down to the rock. They also appeared on the payroll. By stripping I mean, sometimes in blasting the rock the earth was exposed and it was necessary to take some of that off.

As a result of these different industries the stone was taken down to the dock and then transferred in barges and scows, in the early days.

Our scows go to the point where the breakwater was being constructed for the United States Government. At that point there was a government inspector who showed the captain of the tug or the captain of the crew where the stone was to be dumped or taken out of the scow. All of these men appear on the payroll, except the inspector. I think they boarded on shore that year, 1903.

At the end of each month, or rather about the early part of the month following the rendition of services and the selling of supplies, I received a payroll from my timekeeper, and I also received a paper from Mr. Bartlett, his list.

Q. And you say you compared the two?

A. They could not compare.

Q. You could not compare them?

A. Why, certainly—there were two different—I did not compare them then; put it that way. After the deductions were made on the payroll of Bartlett's store account, we then made pay envelopes. I then took Bartlett's store account and saw how much

Bartlett charged up the amounts to the several numbers. If
144 the man had worked only long enough to take it, I simply deducted enough on the theory that the man— If on our pay-roll as transmitted by Mr. Mayo there was a less amount than claimed by Mr. Bartlett, I deducted that amount from the sheet furnished by Mr. Bartlett. I deducted the amount that I could deduct and deducted from Mr. Bartlett's sheet any overcharge.

When I found out the amount was due, when I ascertained the amount that was claimed by Mr. Bartlett, after I tallied it with Mr. Mayo's time sheet, I did not at that time take the envelope and put in the amount of money. I always paid the men in money. I think we paid Mr. Bartlett both ways. When I paid Mr. Bartlett by checks, I did not also pay the men.

Wait one moment. I don't know what you mean by this question. Did I also pay him at that time, at that particular time? If that is it, I do not know. When I got the pay roll from Mr. Mayo I did not charge it in my books as a matter of business. When Mr. Bartlett sent me a statement of the amount of money that he claimed I did not charge it in the books or on the card ledger. I credited Bartlett the net amount of his store bill; that is, when I received one of these papers from Mr. Bartlett I credited his account with the amount that appeared on there after I ascertained it to be correct; after I came back from the quarry. I think that was the regular course of business when these papers were received from Mr. Bartlett. I think they were entered on these card slips in my office. I kept several cards for different years. There were several records, but all in one account of Frank P. Bartlett. I do not recall how they were kept, but we had cards for other years.

145 When one card was used up I do not think it was carried over to another card. I think 1903 was kept on one or two cards, and 1906 was entirely on a separate card. If we had the cards here I could explain it.

When I sent Mr. Bartlett money, I charged it in the same way. I credited his account with the amount of all credits and charged him with the amount of money I sent him.

That will also appear on the card ledger, as well as nearly every other expense on the Bartlett account, but for different years.

I thought his total account, judging from the amount or number of men we had and the number of months we worked, was eight or ten or eleven thousand dollars.

I should say to the best of my recollection that we paid Mr. Barlett two or three months and possibly more; I should say there was about $5,000 possibly due to him on this work; that is my best recollection.

To the best of my recollection there would be between $5,000 and $6,000 due; maybe a great deal more than that. I won't go any further than that statement; that is my best recollection.

I have made efforts to get these cards; I have made some effort to get them once and tried to find them when I got to your office and found the desk where it was contained, and did not get the cards. I found some private papers of my own, but not those cards. There were other matters than those cards that I was anxious to get

This card ledger was kept in the regular course of business. If I could find it now I assume it would be correct. I could tell you if you produced it.

146 We paid Bartlett in 1905 and 1906, which possibly you might consider as belonging to 1903, and I would construe it on some other payments. They were made in several different years.

Let us take that up, then. Bartlett had no other contracts, that were supplied with stone from Sachem's Head quarry at that time, but in 1905, the fall of 1905, there was a contract with John F. Donovan at Point Judith. That was supplied with stone from Sachem's Head quarry, under the same general system, and same general arrangement, practically.

The Federal Contracting Company was then in existence, 1905 and 1906; do you know when the Breakwater Construction Company was—It was either the Federal Contracting Company or the Breakwater Construction & Engineering Company.

Still owed him some money on the old account. Still owed him considerable money, I think to the best of my knowledge.

I don't know how many checks I sent him; he used to come in once and a while and get $100 once in a while; he used to call at the office frequently and ask for his money. When these moneys were given to him they were given to him on account; in 1904 if we gave him any it would be on the old account.

In 1905 sometimes we would take the entire pay roll as we got it from the bank and make up envelopes, for instance, if Bartlett's account was, whatever his account was, $1,000 or $1,500 and sometimes that would be taken over in an envelope in cash. Usually we did not pay him at the time we paid the men, and we would then let his account stand and send him a check later for it, de-

147 pending on how much money we had in the bank.

This second contract that I say was made, was, I think, in October, 1905, if I recall.

I made a contract with the government, and myself, John F. Donovan, for work which was to be done and supplied for out of this Sachem's Head quarry, in October, 1905.

I think at that time there was an agreement made between me and either the Federal or the Breakwater Company—I think the Breakwater Construction Company made an agreement with me to do that work. I think it was in writing, if I recall. All my papers have been shipped with the general office furniture.

Mr. MYERS: I offer in evidence for the purpose of establishing the date on the certificate of incorporation of the Breakwater Construction & Engineering Company—I offer in evidence that certificate.

The certificate above referred to by Mr. Myers received in evidence and marked Defendant's Exhibit C.

The reason for the incorporation as far as I know, of the Breakwater Construction & Engineering Company was the dredging plant at that time, or shortly before that, I think, that had been sold to the New Jersey Terminal Company, and it was thought best to form

an entirely new corporation for the assets of the Breakwater works, such as works, quarries and properties of that kind, so as to distinguish it from the old company that had the other contracts.

I think the Federal Contracting Company was to turn over its—and the dredging plant to another different corporation.

148 There was an agreement made of the same character and to the same effect with regard to the Federal Contracts regarding the Breakwater works between the Federal Contracting Company and the Breakwater Construction & Engineering Company, if I recall rightly.

This paper you show me and ask if I am the gentleman, the John F. Donovan, who attested it (showing witness), yes, that is me.

Mr. MYERS: Well, I will ask that it be marked for identification.

The COURT: Yes.

Paper referred to above by Mr. Myers received and marked for identification. Defendant's Exhibit D.

That is my signature (showing witness). I don't know what the statements in it are; I don't know what it is. You simply asked if it is my signature.

Mr. MYERS: It is from the records of this Court, if your Honor please, and I ask to have it marked for identification.

The COURT: Mark it for identification.

Paper above referred to by Mr. Myers received and marked for identification. Defendant's Exhibit E.

I have no data or copies of any entries in my possession. I did not supply Mr. Norris with any.

Q. Do you know how Mr. Norris could get any copies of entries out of the books of Hughes Brothers & Bangs, or the Federal Contracting Company, other than through you?

149 Mr. CHENEY: Objected to.

The COURT: Objection sustained.

Mr. MYERS: Exception.

I did not give to Mr. Norris copies of entries out of the books of Hughes Brothers & Bangs; I have not seen the books for a number of years.

I did not at any time make any entries out of them and keep any copies for myself, except possibly my own personal account with them, and I am not sure that I have that.

I did not keep any copies of any entries of the account of Frank P. Bartlett in the books; I do not know that his account was kept in the books.

I did not make copies of the card ledgers; if I did I would know the exact amount that was due him.

Q. Do you know how Mr. Norris could come into possession of them except through you?

Mr. NORRIS: Objected to.

The COURT: Yes, that is the same question. Objection sustained.

Mr. MYERS: I take an exception.

The matter that you show me (showing witness) is in my handwriting on the left (indicating). I know in whose handwriting the left hand side is, card 2. It is mine.

The left hand side of card 3 is written, some in Irwin's, and some in my handwriting.

The COURT: Are they distinguished by numbers, those cards?

Mr. MYERS: Yes, sir; this is card 3 I am showing him.

The COURT: Mark a 3 on it.

150 Mr. MYER: Yes, sir. We will mark them, sir, in order.

There was an arrangement between Hughes Brothers & Bangs as to a percentage to be paid by Mr. Bartlett on the amount received by him; on the second contract.

On card 3 that is my handwriting (indicating). All but two of the lower ones in Irwin's handwriting. All those in my handwriting (indicating).

The COURT: Now, on card 3. There are 1, 2, 3, 4, 5, 6, 7. There are seven now. Now, point out the ones—just call off up there the numbers that are in your handwriting.

The WITNESS: Third, that is not mine, but this is (indicating), July 17th and August 31.

I do not recall whether I closed that account up by any entry. I do not recall whether there were any other cards in the card ledger or account other than the three that have been shown to me. I mean Bartlett's account. I do not recall all of them.

I cannot offhand tell what date the account was opened; the cards would show it of course. I assume the account was opened in the spring of 1903, but that is only my best recollection; I do not know what dates are on the cards, of course. Bartlett did not send in estimates. I don't know when Bartlett sent his first claim for supplies furnished, except that I suppose it was in April or May.

I have only seen part of the cards; possibly they are correct. I could recognize this as containing the amounts, if I could see. I cannot tell whether those are the cards. I will have to see the cards.

151 On the debit side of the account was where I charged him with money that he received from time to time, checks and money.

The credit side would show the store bills sent from time to time and freight and other expenses, to pay for items outside of those store accounts; that would be separate from the store bill.

On the 25th day of May, 1905, I paid Mr. Bartlett (showing witness a card) two items. The first one is $106. On the 25th day of March, 1903, I paid him $658.12 (showing witness). That was for items previously credited on Mr. Bartlett's account; March account.

On the 27th of June, 1903, it shows we paid Mr. Bartlett $981.49. On the 25th of August, I paid him $1,239.60 by check.

On the 5th day of October, 1903, I paid him $1,589.56 by check. I paid Frank P. Bartlett on the 29th day of October, 1903, $1,000.

On the 2nd day of February, 1904, I paid $872.39. I paid him on the 21st day of March, 1904, $500.

On the 13th day of August, 1904, we paid $200. I had personal knowledge of all those payments at the time; these are my entries (indicating).

I cannot deny those payments; the cards are here. I am glad they are here. I have been trying to get them for a long time.

On the 11th of October, 1904, I paid Mr. Bartlett $100.

On the 31st of January, 1905, I paid Mr. Bartlett $100. On the 1st day of March, $100; on the 23rd of March, $100. These are entered in his regular account.

Q. Yes, $100.

A. Yes, sir.

These are entered in his regular accounts seriatim, as I have read them.

152 How much we debited Frank P. Bartlett with on the 24th day of November, 1905, the cards show it on a different account.

I don't know where I got any money from with which I made payments that I have testified to; whether I got it in cash or from the office. Either from Hughes Brothers & Bangs or the Federal Contracting Company; it don't state. There is no dispute about the amount; I do not know where the checks came from.

I take up card 2; on the 24th day of November, 1905, I paid Frank P. Bartlett $204.04. On January 10, 1906, $1,004.72. On the 13th day of February, 1906, $1,333.64; on the 5th of April $1,313.11, on the 24th of April, 1906, $1,222.91; on the 25th day of May, 1906, $1,800.72; on the 22nd day of June, 1906, $1,264.20.

Q. Now is the amount of totals figured up on the card, including the second card?

Mr. Myers: The first one I offered is against Anson N. Bangs. The purpose is to show insolvency.

Mr. Myers: The return of execution is common law evidence of insolvency. They show the execution unsatisfied.

Bond and judgment against Bangs individually, one against Anson M. Bangs for $569.47, dated the 3rd day of March, 1908; execution issued on the 3rd day of March, 1908 for $569.47, and returned unsatisfied May 1, 1908, against Anson M. Bangs, for $31.07; execution issued 15th of November, 1909, and returned unsatisfied; December 29, 1909, execution against Anson M. Bangs for $129.50, issued February 3, 1910 and returned unsatisfied April 8,
153 1910; execution against James Hughes and Anson M. Bangs, copartners, for $4,038.96, issued on the 30th day of January, 1907, and returned unsatisfied March 27, 1907.

Mr. Myers: Judgment against the Federal Contracting Company, execution issued for $171,314.79, entered May 21, 1908, execution returned unsatisfied June 11, 1908. Now, we can take these dates down. Certificate of incorporation of the Breakwater Construction & Engineering Company, filed October 13, 1905, and Certificate of incorporation of the Seacoast Construction Company, filed and recorded April 26, 1907. It is conceded that a petition in bankruptcy was

filed in the United States District Court for the Southern District of New York in March, 1908 to have the Breakwater Construction Company declared an involuntary bankrupt, and that there was an adjudication in due form entered against the Breakwater Construction & Engineering Company, it was May 2, 1908.

The COURT: Do you concede that they were adjudicated a bankrupt?

Mr. CHENEY: I don't know whether they were or not.

Mr. MYERS: They were, all right.

The WITNESS: July 17, 1906, $1,307.89 was paid. August 31, 1906, $1,118.73. On September 14, 1906, there was $843.48 paid.

I would have to separate the two accounts to tell the total amount of money that was paid to him; they are on two separate cards. There is a statement there in my handwriting in pencil.

Q. The account of Frank P. Bartlett I have shown you. I ask you now if you have made any statement as to the account I have shown you, whether the account was paid.

154 The COURT: There has been no account shown him as far as you have gone.

Mr. MYERS: I except.

Q. Have you at any time stated that the account of Frank P. Bartlett was paid in full?

The COURT: That is the same question.

Mr. MYERS: I ask him for a statement in this account.

The WITNESS: Before I answer that I must know which account you mean. I might have stated that the second contract account was paid in full; I might have, I am not sure.

Mr. MYERS: I offer this paper in evidence.

The COURT: Is that the account?

Mr. CHENEY: We would like to see it now, Mr. Myers.

Mr. MYERS: All right.

Mr. CHENEY: I object to this at the present time. We have not had an opportunity to inspect them very fully. I do not know the purpose of the offer.

The COURT: I suppose it is to make evidence of what the accounts actually show.

Mr. CHENEY: If it is under the defense of payment, which I understand Mr. Myers had conceded to be correct——

The COURT: I suppose it is to show the balance.

Mr. CHENEY: The reason I object to this is, this is apparently a ledger account. It is utterly impossible for us to take up this account and ascertain what these items are.

The COURT: You object to them?

Mr. CHENEY: Yes.

Mr. MYERS: I take an exception.

155 Now, your Honor, I offer these, sir, in connection with his direct-examination and cross-examination, part of the defense as payments.

The COURT: Yes, I exclude them.

Mr. MYERS: I except. It is conceded that the Point Judith contract was completed November 4, 1903—Mr. Donovan's contract, November 8th. The last payment was made by the United States government on all percentages, and the balance due under the contract, amounting to $8,956.44, on December 22, 1903.

At the time of the Point Judith contract in 1905 I had a conversation with Mr. Bartlett as to running the store.

Mr. MYERS: I object to that.

The COURT: Objection overruled.

Mr. MYERS: Exception.

The WITNESS: We talked again on the question of his having the commissary at Sachem's Head.

Q. What was the arrangement as to the commissary?

Mr. MYERS: Objected to.

The WITNESS: He was to run the commissary again, and he said that we still owed him considerable money on the old account and wanted to know how he was going to be sure to get his money on the second account, and how he was going to get his money. I told him we would try and pay more promptly. I also told him on this contract that the company should get something out of it. In other words, that we did not propose to have a commissary when we could run it ourselves and make a little money on it our-
156 selves, and out of that contract we would have to take some percentage, something about a deduction, the percentage that was to be made at that time.

The COURT: Was anything said to you by him or you to him about the contract as to payments which were to be made in the future?

Mr. MYERS: I object to that, your Honor, on the ground that it cannot bind Hughes Brothers & Bangs.

A. Yes, sir, that we should try to pay him more promptly.

By the COURT:

Q. Did you say anything to him about the payments which were to be made after October, 1908, whether they were to apply on the first or second contract, and if so, what?

Mr. MYERS: I object to that, if your Honor please.

The WITNESS: That we should start in on this contract and try and pay him month by month as far as we could.

Q. Was anything said about subsequent payments as to whether they were to apply on the first or second or old contract?

A. Except in that way, that we were to pay him promptly on the new contract and try to pay him occasionally on the old contract as fast as we could get the money.

Q. I want to know what you told Bartlett about it?

A. That is the talk. He said, "You owe me money now, and you have not paid the money you owe me." I said, all right.
157 We will start in on this contract, we will try and pay you each month when the payroll is paid on this contract and

then endeavor to gradually catch up with you if we can, and pa
you on the old contract from time to time, but we should mai
specific payments each month on account of his payroll on accou
of the second contract. In other words, the total payroll should
taken over there.

I don't recall whether we had any further conversation with hi
or not, except that he was always asking for his money that we ow
him from time to time, whenever I went to the quarry.

Q. Can you state, Mr. Donovan, what time of the year he severe
his connection with Hughes Brothers & Bangs and the Feder
Contracting Company?

Mr. MYERS: Objected to as irrelevant, incompetent and imm
terial.

The COURT: Objection overruled.

Mr. MYERS: Exception.

The WITNESS: I think it was right after the commencement
the second contract, if I remember.

Q. What was his salary per month?

Mr. MYERS: Objected to.

The COURT: I will take it.

Mr. MYERS: I take an exception.

The WITNESS: Up to the time he was succeeded by another part
as superintendent his salary, I should think, was either $100 pe
month, or $150; I think it was $100 a month.

By a JUROR:

Q. Did you always pay the payroll in cash, or did yo
158 remit the money to Mr. Bartlett at times and he paid them

A. I always paid the men in cash myself at the quarr
every time. They were always paid in cash in pay envelopes; w
never paid a man by cash.

JOHN E. IRWIN, a witness called on behalf of the plaintiff, bein
duly sworn, testified as follows:

Direct examination by Mr. NORRIS:

I am employed by Kountze Brothers, bankers. In 1903 I was i
the employ of Hughes Brothers & Bangs; it was my duty to assis
Mr. Donovan, and I assisted him in general office work. I checke
the bills and worked on the payrolls and helped sometimes to mak
up the payrolls, and that is about all, and general office work.

I do not recall between March and November, 1903, making up
payrolls for Sachems Head quarry, except I helped on them every
month. I can describe the payroll to the jury, so as to show how
the columns were made up. There was the man's number, and I
think his occupation, and the number of hours he worked each day.
Then there was the total number of hours in the month or the total
number of days, rather, and the rate per hour; the rate per hour,
how many cents per hour, and then there was the total amount that
was earned, and then there was another column for deductions

for either rent or store bills, for the laborers. That is Mr. Bartlett's store bill, and then there was a net amount for the man when he got any money. Now upon these payrolls, the man's name
159 would not appear; there would be a number. I don't remember whether the payrolls were Hughes Brothers & Bangs or the Federal Contracting Company. The last time I saw the card indexes was at Mr. Myers' office, May 11th, this year.

I saw one book of the Federal Contracting Company. It was contract and general ledger No. 1. When I received Frank P. Bartlett's account I checked it. I would check the extensions and anything else, I would judge, that needed to be checked, or not.

Q. I show you Exhibits Nos. 7 and *and* 8 and 9, and ask you what you did with those exhibits (showing witness)?

A. I would mail them to Mr. Bartlett.

Q. That is after you had checked the account of Frank P. Bartlett monthly?

Mr. MYERS: Objected to.

Q. (Read.)

A. Yes, after they had been checked back with the payroll.

Briefly, the method we took after we received the accounts from Frank P. Bartlett each month, was, we took the payroll and entered opposite the man's name the amount, the amount he had earned, the amount of Mr. Bartlett's bill.

Mr. MYERS: Your Honor, I object to that, because it calls for the contents of the books.

The COURT: The books are of no consequence. Unless you consent to put them — there is no competency here.

The WITNESS: Your Honor, this entry was not made in this book.

Cross-examination by Mr. MYERS:

160 I saw these cards at the office of Mr. E. J. Myers, who is now examining me (showing witness). Those were cards originally kept in the account of Frank Bartlett.

Q. Were the entries there made at the time of the items, or when the items were charged against the firm and the company?

Mr. NORRIS: I object to that unless he made the specific entry himself.

The COURT: That is the same thing he objected to, and you now object to it. I sustain it.

Mr. MYERS: Exception.

I now renew my offer, sir, to put these card ledgers in evidence.

Mr. CHENEY: We object to them.

The COURT: Objection sustained.

Exception.

FRANK P. BARTLETT, recalled.

Direct examination by Mr. NORRIS:

The conversation I had, either with Mr. Bangs or Mr. Donovan

Breakwater was about October, 1905. It was with both Donovan and Bangs; not one interview with both persons. It was three or four days when I made my agreement with them. I see Mr. Bangs first and I tell him if he wants me to go up there and furnish him men at Sachems Head, and he said, yes. Well, I tell him, "You owe me money, so much money on the other contract, because you must pay me immediately, because I cannot afford that." He says, "Oh, well we will do better this year on the contracts, because I am in better shape now, and we will pay you some on what we owe you on
161 the other contract," so I say, "Well, all right. I will undertake to do it," and he told me then that—he gave me the order to go up and take care of the place up there, and I employ some men, and he told me—I went up there and took care of the dredge and began that way. He told me to go up there and dredge the dock there and I went up there and began to dredge.

I told him that it must be paid more promptly on this contract, and he stated he would pay me more promptly, and proposed to pay me something on the old contract. But he didn't pay me anything. He said he would pay me, and I went up there and keep on in the same way. Sometimes he give me money and sometimes not.

The WITNESS: The various laborers that I recruited in New York lived in New York. Some in Park Street, some in Bleecker Street, some in Essex, Macdougal Street, all over the City and generally I have to get a place to meet them, and they come and look for me, and I engage them; and sometimes down in 154 Bleecker Street, and down in Macdougal Street and in Thompson Street.

I have not any independent recollection of the amounts of my bills for October and November, 1903, which were sent to Hughes Brothers & Bangs; I cannot testify without looking at a book as to the amounts.

That is a book that was kept by the bookkeeper (showing witness).

I don't think during the months of October and November I received any of these slips such as were marked in evidence, from Hughes Brothers & Bangs. They would be there if I had received any.

162 Mr. NORRIS: Now, your Honor, I will offer this book. That is marked Plaintiff's Exhibit A., attached to the commission taken in Boston, in evidence.

Mr. MYERS: Objected to as incompetent, irrelevant and immaterial and as not having been sufficiently proven, and it appearing upon evidence in this case, the circumstances under which it was made, that it is not a book of original entry or a copy thereof.

The COURT: I will take them.

Mr. MYERS: I except.

Books above referred to by Mr. Norris, received in evidence and marked Plaintiff's Exhibit 14.

Mr. NORRIS: The plaintiff rests, your Honor.

At the close of the foregoing evidence in chief offered by the plaintiff, the counsel for defendant United States Fidelity & Guaranty

Company moved the Court to dismiss the complaint, in words and figures following.

Mr. MYERS: "If your Honor please, I will make a formal motion to dismiss".

The Court overruled said motion in words following.

The COURT: "I will deny it now and give you an exception. You can put in your case now."

To which ruling of the Court counsel for the defendant, United States Fidelity & Guaranty Company, then and there excepted.

The defendant to sustain the issue upon its part, then through its counsel offered the testimony of the following witnesses as its evidence in chief.

63 Mr. MYERS: Yes, sir: I offer in evidence, your Honor, part of my case the agreement between the Federal Contracting Company and the Breakwater Construction & Engineering Company and heretofore marked Exhibit D. for identification.

Mr. NORRIS: I think that is the agreement you already excluded. object to it.

Mr. MYERS: Your Honor excluded it as not being part of the cross-examination.

The COURT: It cannot do any harm. I do not yet know just what the defendant's case is in that respect.

Mr. NORRIS: All right.

Mr. MYERS: I now offer in evidence the agreement between Anson . Bangs and James Hughes, surviving members of Hughes Brothers & Bangs, and the Breakwater Construction & Engineering Company, and all to the same tenor and effect.

I also offer in evidence the public laws, general statutes of the ate of Connecticut.

The COURT: It is not necessary in the Federal Courts, Mr. Myers.

Mr. MYERS: And a note may be made of it in connection with e evidence.

The COURT: Yes, I will take judicial notice of any statutes you er.

Mr. MYERS: Just note please, the Court takes judicial notice of e sections of the statute pleaded in the answer.

The COURT: Yes.

Mr. MYERS: It is conceded that the defendant surety company a foreign corporation and a citizen of the State of Maryland?

Mr. NORRIS: It is.

4 ANSON M. BANGS, a witness called on behalf of the defendant, being duly sworn, testified as follows:

Direct examination by Mr. MYERS:

I am the sole surviving member of Hughes Brothers & Bangs, and m the gentleman or individual who has been named throughout s trial as Anson M. Bangs, and the person who figured in these ferent contracts and mentioned by the witnesses during this trial. e directions I gave concerning making payments to Mr. Bartlett, re: I always instructed Mr. Donovan, who was the bookkeeper, to le with Mr. Bartlett the oldest bills first, and he said that he did.

I heard the testimony of Mr. Donovan as to instructions or conversations regarding payment under the new contract and in respect to the old contract; it did not take place; I did not have any such conversation; I did not have any conversation with Mr. Bartlett at any time or place in which I told him that I would make the payments under the new contract instead of the old, or that there would be anything other than the directions which were given to Mr. Donovan to make payment; I had no conversation with Mr. Bartlett about it.

Q. Was there not any conversation at any time in which you stated that payments which were made after or between 1903 or 1905, would be applied in any particular way?

A. What, the new contracts, you mean?

Q. Yes, sir.

A. No, sir.

155 Cross-examination by Mr. NORRIS:

Q. Mr. Bangs, the second contract was dated sometime in October, 1905. Did you, under the Act of Congress of August 13, 1894, which was amended February, 1905 ——

Mr. MYERS: The law fastens him with knowledge as to the Act of Congress, and it is irrelevant, immaterial and incompetent.

The COURT: Allowed.

Mr. MYERS: Exception.

Q. (Read.)

A. I don't know as I do. I may have known about it, but not that I recall now.

I gave Mr. Donovan instructions more than once as to the payment of this Bartlett account; a number of times. Many times I talked about different accounts. Not his alone, but different accounts of the old firm of Hughes Brothers & Bangs.

I cannot state now whether any payments were made on the 1905 or 1906 account, and I cannot state as to the 1903 accounts from my personal knowledge; not this moment, any more than I know that payments were made. Mr. Donovan was my bookkeeper in 1903. He was also secretary of the Federal Contracting Company in 1903.

By the COURT:

Q. Did you ever say to Bartlett that you would try to pay him more promptly on the contract?

A. No, sir; I had no conversation with him in regard to such matters.

By Mr. MYERS:

Q. Just one question I forgot. Mr. Bangs, do you remem-
166 ber any statement to Mr. Donovan at any time concerning whether this account had been paid in full?

Mr. NORRIS: That I object to.

The COURT: Objection sustained.

Mr. MYERS: Exception.
That is our case, sir.
The COURT: The defendant rests.

JOHN F. DONOVAN, recalled in rebuttal on behalf of the plaintiff.

Direct examination by Mr. NORRIS:

Q. Did Mr. Bangs ever state to you that we are to settle with Mr. Bartlett the oldest bills first and that you said you did so?
A. I could not swear that he did; I would not swear that he did; I would not swear that he did.
The COURT: Would you swear it now?
A. No, sir, I would not: we had a good many conversations with him in regard to running account.
I think it was September or October, 1905, when the work began under the second contract; the work was finished about a year or a year and a half after that; I don't remember the exact date. I would not say when it was completed; it is a matter of record. My best recollection is that it was about the 1st of January, 1907; maybe it was February, possibly March or April. I should say it was surely closed at the latest, the spring of 1907.

167 Mr. MYERS: That is all.

By a JUROR:

Q. Did you simply consider the check a receipt from Mr. Bartlett; did you take receipts at the time you sent him checks?
A. We didn't take any receipts. Oftentimes I delivered checks to him when I went over to the quarry.

Mr. NORRIS: Your Honor, I served notice to produce here, and I see that Mr. Myers has offered in evidence certain documents. I think now they should be required to produce them, to produce that indemnity agreement. It is part of their affirmative evidence, or else I would like to have it stated on the record that they do not wish us to go into that question.
The COURT: The only thing is where there was a question of whether there was an indemnity it would be a case for the defendant to put in some proof to show that acting upon the supposition if it was closed the surety had turned over to the principals——
Mr. NORRIS: What I want is to have it noted in the event of an appeal. This question might be raised afterwards. Here they are an insolvent corporation, and an insolvent contractor. Why did they wait. If we can show at the trial that there was an indemnity agreement——
Mr. MYERS: I will produce the agreement if your Honor thinks it is competent or material.
The COURT: If you object to it, Mr. Myers, it won't go in.
Mr. NORRIS: Exception.
The COURT: Is the testimony closed?
Mr. NORRIS: That is our case, your Honor.

168 At this point in the case counsel for the defendant, United States Fidelity & Guaranty Company, asked the Court to direct a verdict in favor of the said defendant, in words following:

Mr. MYERS: "I asked your Honor to direct a verdict for the defendant," to which the Court stated as follows:

The COURT: "I will take that into consideration."

Adjourned to Wednesday, May 25, 1910, at 10 a. m.

U. S. for F. P. BARTLETT
vs.
U. S. FIDELITY & GUARANTY CO.

NEW YORK, *May* 25, 1910.

Mr. MYERS: The Court rules that the plaintiff's counsel is entitled to look at and use the cards from the card ledger that were offered in evidence which were excluded on his objection, and after having declined to permit the counsel to look at the cards I yield to the Court's ruling, and take an exception.

The COURT: Show him those cards. It is the order of the Court. Show them those cards. Such tactics will surely react against your client.

Mr. MYERS: I except to the language of the Court, to my tactics. I do not intend to in anywise obstruct this case or present it unfairly to the jury.

Mr. NORRIS: As I understand from last night the card ledgers were excluded and that you are going to leave it to the jury as to the question up to the time of the second contract.

169 The COURT: The question will be first what payments have been made prior to October, 1905, and second, as to whether the transactions subsequent to October 2, 1905, may be subsequent payments on the first or second contract. I shall charge the jury in the absence of some agreement to that effect, the payments must be charged against the earlier contracts.

Mr. NORRIS: Your Honor, upon reflection now, as we have not got all of our books, I am perfectly content if your Honor wishes.

The COURT: I do not wish.

Mr. NORRIS: I am perfectly willing in furtherance of justice to allow the card No. 1 which is of the first contract to go in evidence, because there it shows payments on accounts.

The COURT: They are not offered now.

Mr. MYERS: I offer the three cards in evidence.

Mr. NORRIS: No objection.

The three cards above referred to by Mr. Myers received in evidence and marked Defendant's Exhibits F, G, and H.

The COURT: I do not consider the averments of laches made out. I mean by laches, I include any action of the Surety Company upon the face of the inaction of the contractor, and so I shall take that question from them.

Mr. MYERS: I except.

So practically the only question as I understand it, is as to the agreement that was made.

The COURT: As to the question of whether the transaction took place as he testified; whether as a matter of fact, the work was done, and the question of the payments.

Mr. MYERS: I except.

170 That was all the evidence in the case, and at its conclusion, counsel for the defendant, United States Fidelity & Guaranty Company, again renewed his said motion and to direct a verdict for the defendant, and after the argument of the counsel, both of the plaintiff and the defendant, United States Fidelity & Guaranty Company to the Court upon said motion, the said motion was by the Court overruled, to which action of the Court in overruling the same, counsel for the defendant, the United States Fidelity & Guaranty Company, then and there by the permission of the Court excepted.

Mr. Myers summed up for the defense.

Mr. Norris summed up for the plaintiff.

After said argument the Court charged the Jury as follows:

Charge.

The COURT: (HAND, *J.*):

Gentlemen, the general character of the action, I think, has sufficiently shown itself already to you. In 1894 Congress passed an Act which was within its province, that any person who should take a government contract must provide a bond, and that the condition of the bond—which means the provisions upon which it became operative—was to pay any default of the contractors to the government. In the first place the condition arose in case the contractor failed to finish the contract in accordance with the stipualtions contained in it; and second, to pay those who "Supply the contractor labor and materials in the prosecution of the work provided in such contract." The purpose of the Act was similar to the purpose of

171 the State Acts which you probably are all familiar with in a general way, and which are known as the Mechanics' Lien Acts. That is, if a man supplied to that contractor who got a contract from the government, labor or material which was used in the prosecution of this work which was provided for in the contract, then if the contractor did not pay him the amount which was due him for his labor or his material, he could see his bondsman or surety and make him pay. This was the Act which was in force at the time that Donovan entered into the contract with the United States government for the construction of the Point Judith Breakwater, and this action is brought upon claims for labor supplied in the prosecution of the work at the Point Judith Breakwater, which was provided for in that contract.

Now, Bartlett, the relator in this case, did not perform labor and he did not supply material, but he comes here as an assignee of the laborers' claims. The first question is, what those laborers' claims were. Assuming for the time being that he as assignee can stand

in the shoes of the laborers themselves, the laborers were at the quarry for the most part at Sachem's Head, some fifty or sixty miles from the breakwater, and their work consisted of some various things; part of it was actually drilling and blasting of stone which was used in the breakwater, and part was incidental to that drilling and blasting, such as sharpening of the drills when they became rusty, repairs of the cars as things became broken. There was a small tramway and by that tramway stone was taken from the quarry down to the Sound where scows lay which carried the stones to Point Judith through the Sound to Watch Hill. Part of the work was the carpenter's in repairing the derricks if they became injured in the progress of the work, as was the case, I as-
172 sume, on account of its heavy, rough character. In any event, such labor was performed in keeping these derricks so that they could hoist the stone and in keeping the cars so that they could carry the stone, and in general making it possible to carry on the work. Now, all that work, all that labor, I charge you was work done in the prosecution of the work, and it is work for which the laborers could themselves recover under this bond.

How is Bartlett entitled to sue in their place? He says that as he engaged each one of the laborers he told him that if he went up there he would be provided for by the commissary store, which he, Bartlett, was going to run close by the quarry; that at that place he could get supplies such as he needed, and that those would be charged against him on Bartlett's books, and that they would be deducted from the wages which he was to get from the employer, who was, as you will recall, Hughes Brothers & Bangs. Bartlett says that he told the laborers that the deductions which were made for the supplies that he gave them he, Bartlett, would collect. He does not say, as I recall,—perhaps your memory will be better than mine in that respect, and of course it is your memory that must control you on any such question of facts as those—I do not recall that he says he ever had any conversation with any of the laborers of this character, except when he first employed them; but he does say that at the time he did employ them he had that conversation and that after he had told them this in each case, they said they would come.

Now, the first question as to the assignment of claims, is whether you believe that Bartlett, who is an interested person, made an agreement with laborers such as he said he did, and if he said that to the laborers and if they went upon the work, that was an
173 agreement on their part that he should take that course of conduct, and then subsequently if they went to his store and got supplies from him, if when they got their pay envelopes, the amount of their supplies were deducted, that would be a further indication of their assent to the agreement. If you find that the business was carried on in that way, that they knew that Bartlett was to retain out of their wages the amount which he charged them for the stores which he supplied, and which they were not getting, and which they understood that he was getting, then you will find that that constituted an assignment of so much of their wages as was

represented by the price of the supplies that he furnished them. That would be what the law calls an assignment pro tanto, an assignment of so much. Now, that is what Bartlett claims for here; and the amount of those supplies, that is, the amount of wages which he became entitled to in that way, are the amounts, he says, that he sent to Hughes Brothers & Bangs, and that they checked over and agreed upon. There were two systems of checking. The laborers had a card upon which was punched the price of each purchase that they made, and periodically when the card was punched out they would go to the store or to Bartlett and see whether the card corresponded to the charge against them upon his books. When I say that was done, that is what he states was done. I think his bookkeeper, Tuffin, said so, as well. That is the system of checking which took place and there was also another system which was between Bartlett and Hughes Brothers & Bangs and by which Bartlett's account was monthly sent to Hughes Brothers & Bangs, and they checked them over with the amounts credited to the
174 laborers so as to see that Bartlett was not getting more from any one man than that man was entitled to from Hughes Brothers & Bangs, because they say that Bartlett took the risk of supplying a man with more supplies than the man had credit for with Hughes Brothers & Bangs. Therefore those two checks were for different purposes in accordance with the business as it was carried on.

Now, if you determine that that story is correct, and the labor was in fact performed and that Bartlett was entitled to a certain portion of the wages for the labor which was done, the question will be as to payments. There is a difference in law between your attitude of mind upon the subject of payments and your attitude of mind upon the subject of the charges. In this case the surety is being sued for the deficiency of Hughes Brothers & Bangs. Of course, you will recall that the contract was formally taken in the name of Donovan, but it is substantially established here that Donovan in so taking it acted for Hughes Brothers & Bangs, or for the Federal Contracting Company, and consequently we may leave out of consideration Donovan as an actual contractor under the circumstances.

Now, as to payments: It is unquestioned that Hughes Brothers & Bangs paid Bartlett certain sums of money and the parties here have agreed that the books of Hughes Brothers & Bangs, and that the entries on these cards which I hold in my hand are correct, and that they correctly show the number of payments and also the charges which were made and the credits which were made to Bartlett, and the charges for payments which were made against him. So you will take those cards and use them as a basis for your calculations as soon as you have found that the facts justify any statement of the account.

175 Well, to come back to the payments. The payments down to October, 1905, the relator concedes should be charged against him. The real issue as to payments is, as to whether payments *were* made after October, 1905, are to be charged against the relator here, or not. Those payments if you charge them against Bartlett would entirely wipe out his account here, and you would

have to render a verdict for the defendant. If no agreement were made by which the payments were to be applied to other liabilities of Hughes Brothers & Bangs to Bartlett, the law will presume that the payments were made upon first credits. That is not, perhaps, as clear as it might be, but in simpler language it means in a case of any account you will consider that the first payment made ought to apply to the first credits. If two men have an account running for a series of years and it ever becomes important to find out to what items the payments were applied, without agreement to the contrary, the law says you must take the first payment, and apply it as far as it will go upon the first charges, and you will take the second payment and apply that on the next oldest charge, and so you will go through the account. The law says it presumes that is so. That means to say that whether the parties intended it that way or not, the law will do it that way; but of course the parties may make a different arrangement by a contract, and if they agree that such payments shall apply to other credits, that is a different matter.

Now, Bartlett and Donovan have testified in this case about conversations with Bangs and conversations between Bartlett and Donovan in which Bartlett said he had had very slow payments on the first contract, and he should want his money more quickly
176 on this, and Bangs and Donovan said that they would see to it that he was paid on this contract, and they might even pay him on the other contract. The question of fact is whether from those words a fair and reasonable intent is to be inferred that subsequent payments which were actually made the parties understood to be applicable to the money that Bartlett was earning after October, 1905, and if you find that that was a fair inference to be drawn from what was said between them at that time, then you must credit those payments after October, 1905, to the second contract which took place. You will not credit it against the contract upon which Bartlett is now suing. If you find that, then the claim of Bartlett will be reduced only by the payment made between March, 1903, and October, 1905, and these cards will enable you to make that calculation.

In proof of that conversation, and indeed upon all the issues in the case, the plaintiff, the relator here, has what the law calls the burden of satisfying your minds by a preponderance of evidence. That is a rather cumbersome phrase, but it means if you are in doubt so that you cannot make up your minds, the defendant must succeed. But the plaintiff, or as we call him here, the relator, must satisfy you. He must turn your minds, he must turn the balance in his own favor, and if the balance remains hanging so that you are unable to be satisfied in your minds as to any fact that fact must count for the defendant. If that fact is necessary to the recovery, the defendant must win.

There were two defenses in this case which the defendant pleaded. By defense, the law means that certain facts which are not simply denials of what the plaintiff says, but facts which the de-
177 fendant himself says and claims to be true, and which he says are sufficient, even admitting what the plaintiff says, and which will turn the scales in his favor. First is the statute of limita-

tions. I charge you that is not a defense in this case. And the second is, that Bartlett, by his long delay, followed as it was by the insolvency, not only of Hughes Brothers & Bangs, but of the several companies which they organized to carry on this business, so prejudiced the Surety Company, the defendant here, as made it inequitable for him to recover. As to that, I charge you that there is no evidence in the case that Bartlett knew that through his delay in prosecuting his claim, Hughes Brothers & Bangs and their companies would become insolvent. There is no evidence in the case that he had any reason to suspect that through his delay the position of the surety would be imperilled, and therefore the case rests simply upon the fact that he did delay, that he did thereby take the risk and so compelled the surety to take the risk of a continued solvency of Hughes Brothers & Bangs and their companies. That, I charge you, is not sufficient under the law to discharge the surety, so you may leave out of your consideration the two defenses that the defendants have pleaded.

There may be some further instructions. I will ask you to wait until counsel have suggested any that they may have.

Mr. MYERS: I ask your Honor to charge the jury that a mere agreement on the part of the laborers to assign their wages in the future or after being earned is not sufficient to save an action.

The COURT: I decline to charge that.

Mr. MYERS: Exception.

178 I asked your Honor to charge that wages must have been earned before an assignment of such wages can be made.

The COURT: I decline to charge that.

Mr. MYERS: Exception.

I ask your Honor to charge the jury that if they find that no agreement was made with regard to the application of the payments, then the law will guide them, and that the law guides them so far as the surety was concerned, and that they could not be changed.

The COURT: Oh, yes. I have meant to cover that, gentlemen, in my charge. I do not know whether I made myself clear or not. At the expense, perhaps, of what is unnecessary, I will go over it again. If there is no agreement here the payments are to be all applied upon the first contract, and that will wipe out all of Bartlett's credits upon that contract. You must find there was an agreement, the plaintiff must establish to your satisfaction that there was an agreement between Bartlett and either Donovan or Bangs that the subsequent payments were to be applied upon the contract of October, 1905.

Mr. MYERS: And if they were so applied either by law——

The COURT: That wipes it all out. No one can change it after that.

Mr. MYERS: I except to your Honor's charge, that portion which begins what were the laborers' claims, and then you proceed to define the work at the quarry, and then you charge the jury that all that work and labor was done in the prosecution of the work, and the laborers could recover on the bond.

The COURT: Yes.

179 Mr. MYERS: I except.

I except to your Honor's charge beginning with the por-

tion which says the question is, it is as to the assignment of the wages. I have not it in exact words.

The COURT: Yes.

Mr. MYERS: And you say to the jury that if the work was carried on in that way or this arrangement was carried on in that way and Bartlett charged the supplies and the amount was deducted from their pay and they understood it, that constituted an assignment of so much from their wages as was represented by their supplies.

The COURT: I think that is substantially so. If they believe that, the story that he told of his talk with the laborers, they may infer from that, or they will infer from that that an assignment was effected.

Mr. MYERS: I except.

I except also in so far as you have stated in substance regarding the application of the payment, it is for the jury to find what the fair and reasonable intent was in regard to their application as to the payment after October, 1905, and if the jury found from the intent of that conversation that there was such an understanding between the parties, they were at liberty to apply the payments after October, 1905, to the second contract.

The COURT: They must apply them to the second contract if they find it was the intention of the parties. It is a question of fact that they will have to determine.

Mr. MYERS: And in that connection your Honor has charged that the burden of proof rests upon the plaintiff.

180 The COURT: Yes.

Mr. MYERS: I except to your Honor's refusal to leave to the jury the defenses substantially pleaded of laches and negligence and which your Honor sometimes defines. May I ask also to except to your Honor's refusal to direct a verdict?

The COURT: Yes.

Mr. NORRIS: I would ask your Honor to instruct the jury that if they find that the net amount prior to the commencement of the second contract be a certain sum, then they are entitled also to bring in $879.90 interest on that amount.

The COURT: I don't know about that. The question of whether there shall be interest or not is a question which you must determine in your discretion. In a case of this character, where interest is not stipulated in the contract, the question of interest is a question of damages, and the jury must determine whether they think in order to make whole the relator, damages are necessary to compensate him for the delay. In that case, they may award damages; but it is always a question for the jury to determine. I will ask you to determine that question not by calculating, or by indicating the sum you do find, but if you find any sum with interest, then the clerk will calculate interest, and in that way I will be able to determine whether you have found it or not.

Mr. MYERS: I except to that.

Mr. NORRIS: I also ask your Honor to charge that the jury may take into consideration the credits and debits shown on these cards, and if they find that a payment was made in 1905 or 1906 subsequent to the commencement of the second contract equal to the same

amount on Bartlett's bill, that will of itself raise a presump-
181 tion that the payments were to be applied on the second contract and not on the first.

The COURT: I will leave that to them. That is a question of fact for them. They can look at the cards which are now in evidence and they can make up their minds as to how far the similarity as to the amounts indicates the application of a given payment to a given charge.

Gentlemen, I want to tell you one thing which I think you know, or rather I had better say—perhaps, I had better get the idea of counsel upon this: The only credit which Bartlett is sued for here, Mr. Norris, are those going down to February 2nd, 1904, is that correct, on this card?

Mr. MYERS: The case is brought on the entire dealings of the parties from the inception to the close.

The COURT: Then in the credits of Bartlett, there are only six items, as I understand it. Is that correct, gentlemen?

Mr. MYERS: The cards will speak for themselves, sir.

The COURT: It was only to help when the last bill was sent. I think it is the fidst six items. Which is the credit to Bartlett, on the right?

Mr. MYERS: On the right hand side, yes.

The COURT: Yes, I see. Then the last,—the total is $10,772.66; is that correct?

Mr. NORRIS: That is, if they add in that freight.

The COURT: What does the credit on these cards indicate? The jury won't be able to tell simply from the card. Gentlemen, it seems to be somewhat difficult from these facts, or to find out from these cards just how much of these credits are prior to November, 1903. I charge you that only the credits as contained on the bills sent by Bartlett prior to November, 1903, can be the basis of recovery here, and that no bills for freight can be allowed.

182 Mr. MYERS: The plaintiff demands judgment for $10,000.44. Mr. Bartlett testified and the complaint admits that he was paid $2,829.16; the debit side of the card ledger shows an amount in excess of that.

The COURT: Oh, yes.

Mr. MYERS: So if the jury started with the amount of $10,000.44, they would then find from the card ledger first how much was paid, and second what application was to be made of it.

The COURT: That is true. But the question is which of those items represent the claim of laborers prior to 1903.

Mr. MYERS: All of them, as I understand.

The COURT: You may take as the basis of the charge all the items upon the right hand side of the card No. 1. Of course, you must limit yourself to the amounts named in the complaint, which is $10,000.44.

The jury thereupon retired at 11 a. m. to consider their verdict and having returned to the Court Room for further instructions, the following transpired.

The COURT: What is the trouble, gentlemen? Are you in trouble?

The FOREMAN: We want further instructions. We want to know if we are to take into consideration only the first six items on the right hand side of card No. 1?

The COURT: No, no; that is not so. In the first place Bartlett's claim is contained on the right hand side. That is correct. Not the left. But all the items upon the right hand side, both in front and on the back, aggregate a little over $10,000. Well, the total claim from which you are to deduct the payment is $10,000.44, so that it is not disputed by the defendant in the case that these items on the right hand, back and front, aggregate the full amount
183 that Bartlett claims. If you should determine that he is entitled to all wages that he sent in his bill, for there is no dispute that he sent in bills for the full amount of $10,000 which is the amount that he claims. In that case the only thing that remains is how many payments are to be credited against that sum of $10,000. Do I make myself clear?

The FOREMAN: Yes, sir; only we do not know whether those payments in 1904 were made on the 1903 account.

The COURT: All the payments made in 1904 were made on the 1903 account. The only issue is whether all the payments made after October, 1905, are charged against Bartlett. Both sides concede that all payments made in 1903 and 1904 are to be credited to the defendant in the case. Both sides concede that, up to October 1, 1905.

The FOREMAN: All the payments shown on that card?

The COURT: Yes, Bartlett concedes that and the defendant claims it. You are to credit the defendant with all the payments which purport to be dated from April to October 1st, 1905. Now, then the question will come up as to payment after October and after that you will apply the rules as I have given them to you. I think it is the first. There may be some question as to the actual date. Let me see the other card.

The Foreman hands the card to the Court.

The COURT: There is one payment, I see of October 20th, $150. Now as to that that is the only payment which need trouble you at all so far as its date is concerned. The contract was let, the second contract was let in October—does either of the counsel know when the second contract was——
184 Mr. MYERS: I understood, gentlemen, October 1st, 1905. They said a contract was made, sir—I do not recall——

The COURT: The exact date is in evidence.

Mr. MYERS: I do not recall it, sir.

The COURT: Well, that being true, you will have to count out the payment on October 20th of $150, so that the question will arise as to the payment after November 1, 1905. All payments before that you must credit to the defendant, because the other side concedes it. There is no question about that. The question as to the credit subsequent to that will depend upon what you find as to the ex-

istence of the agreement between Bartlett and Donovan, or Bartlett and Bangs, and how you are to construe that agreement I have left to you. Do you think that clears the situation up?

The FOREMAN: Yes.

Mr. MYERS: There is no evidence in the case as to when any payment was made by the United States government under the second contract.

The COURT: No, there is not.

Mr. MYERS: And it is for the jury to find under the circumstances and the evidence in the case as to whether any of those moneys after October 26th were received and paid out of the moneys, received from and paid by the United States government on the second contract of October, 1905.

The COURT: I think that is immaterial; I won't charge that.

Mr. MYERS: I except.

The jury thereupon at this point retired for further deliberation and to consider their verdict, and having returned into Court at 12.20 p. m. and rendered a verdict for the plaintiff in the sum of $2,825.37 with interest, the defendant, the United States Fidelity & Guaranty Company thereupon objected to the allowance of
185 interest and moved the court to set aside the verdict and grant it a new trial, in words following:

Mr. MYERS: "I object to the allowance of interest and I ask your Honor to set aside the verdict on the exceptions taken on the trial as against the weight of evidence."

Which motion for a new trial was after argument by the counsel for and against the motion respectively, and after due deliberation by the Court denied, to which counsel for the defendant, the United States Fidelity & Guaranty Company duly excepted in words following:

The COURT: "Motion denied."

Mr. MYERS: Exception.

Will your Honor hold the term so that I can put in my orders?

The COURT: Oh yes; the term lasts until October.

Mr. MYERS: I understand that interest is not allowed?

The COURT: I will look after that.

And now in furtherance of justice and that right may be done the defendant, the United States Fidelity & Guaranty Company, the said defendant tenders and presents the foregoing as its bill of exceptions in this case, to the action of the Court and prays that the same may be settled and allowed and signed and sealed by the Court and made a part of the record, and the same is accordingly done this 22nd day of September, 1910.

LEARNED HAND,
Trial Judge.

186 It is hereby stipulated and agreed that the foregoing Bill of Exceptions contains all the evidence and proofs produced and given upon the trial of this action, and that the same may be

settled and allowed as the Bill of Exceptions herein and ordered on file.

Dated New York this 20th day of Sept., 1910.

SUMNER BOWMAN,
Attorney for the United States Fidelity & Guaranty Company, Plaintiff in Error, Defendant Below.

EDWARD W. NORRIS,
Attorney for Defendant in Error, Plaintiff Below.

Service of a copy of the within Bill of Exceptions is hereby admitted.

Dated New York, August 10, 1910.

EDWARD W. NORRIS,
Attorney for Plaintiff.

(Endorsed:) U. S. Circuit Court, Southern District, N. Y.—Filed Aug. 30, 1910—John A. Shields, Clerk.

187 Circuit Court of the United States, Second Circuit.

UNITED STATES for the Benefit of FRANK P. BARTLETT, Defendant in Error, Plaintiff Below,

against

UNITED STATES FIDELITY & GUARANTY COMPANY, Plaintiff in Error, Defendant Below, and JOHN F. DONOVAN, Defendant.

It is hereby stipulated and agreed, that the plaintiff's exhibits, which upon the trial were at first marked respectively for identification Exhibits 1, 2, 3, 4, and 5, and which later when admitted in evidence received respectively, numbers 7, 8, 10, 11 and 9, coincide each respectively with the exhibits marked in the depositions of Alexander Tofli. "Plaintiff's Exhibits 'B', R E G, 'C', R E G., 'D', R E G., 'E' R E G., and 'F', R E G."

And it is further agreed, that plaintiff's Exhibit "A", R E G., in the deposition of Alexander Tofli, is the same as the Plaintiff's Exhibit 14.

Dated New York November 21, 1910.

SUMNER BOWMAN,
Att'y for U. S. Fidelity & Guaranty Co., Pl'ff in Error.

EDWARD W. NORRIS,
Att'y for the United States for the Benefit of Frank P. Bartlett, Def't in Error.

188 *Amount of Supplies Furnished by the Plaintiff to the Laborers, Board Bill Book.*

(EXHIBIT A.)

Board Bills.

March.		April.		May.		June.	
1	$8.36	1	$42.27	1	$31.94	1	$23.72
2	7.96	2	31.27	2	26.50	2	35.08
7	2.27	6	24.64	4	7.65	4	5.15
13	4.61	7	36.24	5	6.70	5	27.57
14	3.68	8	8.45	6	29.50	6	40.00
15	5.81	9	3.13	7	33.35	7	29.82
16	9.41	10	4.30	8	29.70	8	25.30
17	5.90	13	18.97	9	30.38	9	33.73
18	5.66	14	20.60	10	25.18	10	25.85
19	4.91	15	23.15	11	1.00	11	31.68
20	3.86	16	25.51	12	7.70	12	39.93
21	5.94	17	4.87	13	20.93	13	20.15
22	6.19	18	23.10	14	32.50	14	29.68
23	6.40	19	17.10	15	27.00	15	21.05
24	5.08	20	26.35	16	14.20	16	16.75
25	4.43	21	21.92	17	17.24	17	20.50
26	4.53	22	22.10	18	20.85	18	18.50
27	5.83	23	26.10	19	17.85	19	17.50
28	8.16	24	21.80	20	25.35	20	20.00
		25	22.10	21	20.33	21	20.02
	$108.39	26	24.10	22	16.22	22	18.02
		27	40.10	23	27.85	23	28.24
		28	19.10	24	29.25	24	29.83
		29	27.16	25	18.85	25	18.50
		30	19.13	26	29.38	26	2.83
		31	20.82	27	44.33	27	40.91
		32	18.28	28	17.22	28	18.87
		33	15.83	29	29.85	29	32.50
		34	10.68	30	18.66	30	20.05
		35	12.23	31	20.16	31	21.55
		36	9.66	32	18.85	32	17.60
		37	7.13	33	27.00	33	25.22
		38	10.13	34	27.26	34	30.05
		39	7.13	35	32.13	35	30.73
		40	7.13	36	31.28	36	.90
		41	9.13	37	18.54	37	18.19
		42	11.64	38	26.54	38	23.43
				39	17.54	39	18.19
			$695.35	40	25.54	40	17.05
				41	29.54	41	20.13
				42	31.52	42	31.37
				43	10.05	43	8.00
				44	12.50	44	8.00
				45	18.40	45	17.02
				46	12.65	46	15.05
				47	13.65	47	16.05
				48	15.65	48	16.93
				49	9.84	49	42.47
				50	16.25	50	26.47
				51	6.08	51	20.68

189

52	16.30	52	18.93
53	4.35	53	29.65
54	2.65	54	20.72
55	2.65	55	22.72
		56	.90
	$1,105.40	57	14.75
		58	5.60
		59	12.75
		60	7.85
		61	1.25
		62	17.24
P. Bughiani Scow		63	7.40
Lasca Aristo-		18	5.00
demo..... "		24	4.00
			$1303.17

Board Bills (Cont.).

	July.		(Cont.)		August.		(Cont.)
1	838.22	71	$23.03	1	$29.00	70	$18.55
2	31.38	72	8.25	2	28.91	71	20.55
3	11.39	73	5.50	3	1.29	72	5.95
4	17.38	74	6.01	4	26.55	73	16.45
5	23.80	75	6.57	5	23.05	74	21.16
6	24.72	76	2.33	6	22.16	75	28.85
7	36.06	77	4.25	7	27.05	76	15.35
8	22.70	78	6.24	8	27.16	77	15.73
9	19.24	79	8.35	9	22.38	78	4.92
10	27.74	80	12.74	10	29.06	79	9.77
11	40.96	81	4.66	11	34.66	80	19.52
12	37.03	82	6.34	12	26.85	81	24.73
13	32.14	83	7.42	13	26.38	82	14.16
14	23.66	84	13.08	14	25.00	83	17.38
15	24.70	85	2.59	15	17.65	84	16.22
16	18.24	86	5.29	16	18.38	85	30.97
17	19.24	87	4.81	17	21.38	87	26.73
18	15.65	88	4.06	18	13.90	88	7.36
19	13.45	89	2.45	19	2.05	89	22.11
20	23.85	90	1.17	20	21.91	90	2.20
21	16.72	91	1.10	21	19.67	91	30.34
22	6.72	92	1.10	22	4.44	92	17.16
23	3.65	94	1.45	23	7.49	93	20.31
24	37.11	95	1.30	24	24.50	94	.....
25	15.60	96	1.42	25	19.16	95	18.46
26	22.83	97	1.10	26	15.00	96	5.28
27	10.81	99	1.05	27	22.54	97	24.50
28	15.72	100	1.05	28	9.03	98	1.50
29	26.10	101	1.05	29	17.51	99	19.98
30	19.70	102	1.10	30	20.16	100	23.75
31	21.27	103	1.10	31	22.66	101	20.98
32	26.28	104	.10	32	27.56	102	1.15
33	32.55			33	30.88	103	1.15
34	27.60		$1539.67	34	38.16	104	25.75
35	5.93			35	9.03	105	1.63
36	3.50	Luigi Antonelli		36	1.25	106	1.63
37	16.70	Scow 22.....	14.00	37	17.16	107	6.35
38	22.33	Aristodemo, Las-		38	16.20		
39	16.70	chi, Scow 24.17.53		39	16.16		$1,844.25

Board Bills (Cont.).

190	
40	20.30
41	20.25
42	25.56
43	14.84
44	12.74
45	16.72
46	16.70
47	19.70
48	28.00
49	30.92
50	19.85
51	8.75
52	19.24
53	23.24
54	22.50
55	29.65
56	4.50
57	17.05
58	5.70
59	22.65
60	17.70
61	19.32
62	3.83
63	22.93
64	24.15
65	9.75
66	12.50
67	11.38
68	14.38
69	15.08
70	12.38

P. Bugliani, Scow 18...	24.00
(Breakwater)	
N. Massei....	84.96
H. Contini...	2.76
G. Droghetti.	8.89
C. Borra....	4.82
	$1,616.36

40	21.16
41	12.48
42	
43	14.75
44	11.75
45	13.25
46	18.16
47	18.16
48	28.16
49	14.12
50	21.91
51	8.78
52	19.38
53	30.12
54	27.95
55	25.99
56	1.50
57	5.88
58	14.13
59	16.16
60	17.85
61	9.73
62	7.88
63	18.51
64	36.16
65	12.85
66	19.14
67	17.55
68	17.55
69	21.55

P. Bugiani, Scow No. 18	87.00
A. Laschi, Scow No. 14	20.00
Luigi Antonelli, Scow No. 22	10.84
	837.84
	$1,844.25
	37.84
	$1,882.09

September.		(Cont.)	
1	$27.90	70	$14.59
2	26.90	71	17.59
3	14.59	72	9.50
5	20.59	73	17.66
6	17.40	74	19.27
7	21.09	75	33.55
8	22.27	76	1.20
9	19.75	77	16.40
10	22.85	78	10.25
11	17.95	79	11.17
12	19.91	80	13.90
13	16.72	81	15.99
14	22.75	82	8.06
15	20.50	83	18.50
16	17.75	84	16.75
17	2.90	85	2.90
18	14.90	86	7.90
19	18.96	87	22.99
20	11.80	88	7.75
21	13.90	89	25.90
22	3.90	90	9.25
23	.65	91	24.21
24	24.48	92	19.80
25	13.48	93	9.05
26	17.48	95	22.55
27	16.48	96	5.20
28	1.18	97	14.00
29	2.10	98	6.75
30	16.27	99	20.88

October.		(Cont.)	
1	$21.44	73	$17.50
2	24.53	74	20.85
4	13.98	75	40.50
5	19.00	76	8.50
6	15.45	77	8.65
7	21.50	79	14.50
8	23.83	80	19.50
9	22.74	81	.50
10	22.30	82	12.75
11	21.40	83	17.99
12	5.30	84	22.50
13	16.69	85	7.10
14	21.00	86	15.75
15	23.00	87	5.75
16	16.74	88	12.50
18	17.20	89	4.85
19	25.78	90	7.50
20	20.39	91	10.95
21	16.75	92	7.80
22	16.50	93	6.75
24	26.30	95	6.60
25	13.10	96	10.50
26	23.70	97	22.98
27	17.10	98	2.00
28	7.75	99	9.90
30	17.83	100	18.30
31	11.83	101	5.70
32	8.50	102	20.44
33	20.53	103	22.44

191

31	18.77	100	22.92	34	29.83	104	16.50
32	5.75	101	16.88	35	10.50	105	7.50
33	31.15	102	3.76	36	12.50	106	1.50
34	28.80	103	3.76	37	16.32	107	19.50
35	6.00	104	21.42	38	19.60	108	.....
37	16.27	105	8.50	39	15.32	109	.....
38	20.06	106	8.25	40	17.83	110	.....
39	17.02	107	22.50	41	11.45	111	6.50
40	17.87	111	3.50	42	11.67	112	15.35
41	11.38	112	7.75	43	12.00	113	5.50
42	14.38	113	1.15	44	12.14	114	.....
43	14.20			45	18.45		
44	10.45	8		46	14.83		
45	18.50			47	18.83	P. Bughani,	
46	14.27	Luigi Antonelli,		48	9.25	Scow 18	$11.00
47	15.27	Scow 22....$11.00		49	13.40	Luigi Antonelli,	
48	15.23	P. Bughani,		50	11.40	Scow 22...	11.00
49	10.80	Scow 18....	12.46	51	11.50	P. Patrigna-	
50	15.90	Pietro Patrigna		52	18.74	nelli, Scow	
51	9.50	nelli, Scow		53	12.75	24	6.00
52	17.75	24	11.00	54	26.70		
53	17.04			55	20.00		$1,009.50
54	26.40		$1,050.35	56	1.50		
55	23.23			57	5.50		
56	1.50			58	9.50		
57	5.50			59	13.28		
58	11.50			60	14.50		
59	15.40			61	2.80		
60	12.30			62	12.50		
61	7.85			63	9.75		
62	9.50			64	13.50		
63	8.02			65	15.40		
64	38.46			66	14.74		
65	20.00			67	15.00		
66	17.75			68	16.00		
67	14.59			69	19.00		
68	15.59			70	17.00		
69	19.59			71	20.00		
				72	7.75		

Board Bills (Cont.)

November.		(Cont.)	
1	$7.64	102	$4.39
2	6.50	...	5.38
3	3.52	104	5.18
4	7.17	105	.35
8	7.98	107	.35
9	6.23	111	.35
10	2.58	112	3.52
11	3.85	113	1.35
14	4.36		
15	4.35		
16	1.08	P. Patrignanelli,	
19	8.35	Scow 24.....	$2.00
21	4.35	Luigi Antonelli,	
25	3.35	Scow 22	2.00
26	3.35	P. Bughiani,	
30	3.98	Scow 18....	1.25
31	2.98		
32	1.25		$300.32
33	6.00		
34	7.98		

32	
35	2.20
36	5.70
37	3.98
39	2.98
40	2.98
42	2.00
43	2.24
44	3.12
45	4.67
46	2.98
47	3.98
48	3.00
50	2.35
51	1.35
52	2.68
53	6.35
56	.35
57	.35
58	3.35
60	4.35
62	3.35
63	4.50
64	17.27
66	4.68
67	3.52
68	4.52
69	4.52
70	4.52
71	4.52
72	2.35
75	8.85
76	1.35
77	5.35
78	.35
79	1.20
80	3.20
82	6.85
83	2.68
84	3.85
86	1.85
87	2.35
90	.20
92	.20
93	.35
96	4.35
97	4.78
99	2.00
100	4.08

193

Exhibit 7.

L. H., *U. S. J.*

Deductions made by Hughes Brothers & Bangs (Pl'ff's Ex. B, R. E. G.)

Deduct from store Account, March						
16	had	but	8,10	difference	1,31	
20	"	"	6,61	"	1,55	
						2,86
Deduct from store Account, April						
8	had	but	6,00	difference	2,45	
10	"	"	3,00	"	1,30	
24	"	"	20,55	"	1,25	
27	"	"	39,60	"	,50	
35	"	"	10,20	"	2,03	
36	"	"	5,25	"	1,11	
37	"	"	4,50	"	2,63	
38	"	"	4,50	"	5,63	
39	"	"	4,50	"	2,63	
40	"	"	4,50	"	2,63	
41	"	"	4,50	"	4,63	
42	"	"	4,50	"	7,14	
						37,23

This makes March store bill $106,13
This makes April store bill 658,12

(Ex. 1 for Iden.)

194

EXHIBIT No. 8.

L. H., *U. S. J.*

(Plff's Ex. C., R. E. G.)

Mr. Frank Bartlett, Guilford, Conn.

DEAR SIR: The following were short on your store bill for May—

+4+	$4.20+
5	3.25
9	.98
12	2.75
21	3.53
23	1.45
24	2.25
+26	4.03+
+27	24.35+
35	7.23
36	21.66
38	3.14
42	5.12
45	5.35
48	.65
49	3.39
50	2.45
51	2.63
52	12.85
53	.90
54	.70
55	.70
	$123.91

Making your store account $981.49 instead of $1,105.40.

(Ex. 2 for Iden.)

H. B. & B.

95

Ex. 10.

L. H., *U. S. J.*

(Plff's Ex. D, R. E. G.)

Deduct.	
1	2.05
	10.53+
	4.69+
	8.64+
27	2.31+
42	2.37+
49	9.52+
57	.50+
58	2.75+
59	1.80+
62	2.49+
63	1.70+
Bugliani	5.00
A. Loser	4.00
35	5.22
	63.57

(Ex. 3 for Iden.)

Ex. 11.

L. H., *U. S. J.*

(Pl'ff's Ex. E., R. E. G.)

Total bill F. Bartlett, $1,616.36.
Deductions for July.

	21	3.82	
	23	.20	
	27	4.21	
	28	4.62	
	45	3.82	
196	49	7.52	
	57	1.00	
	79	1.15	
	88	.46	
		——	26.80
			$1,559.86

(Sentence unintelligible.)
(Exhibit 4 for Iden.)

Ex. No. 9.

L. H., *U. S. J.*

Oct. 16, '03.

Mr. F. P. Bartlett.

Dear Sir: On your store bill for August, we notice following errors:

No.	Earned.	Ch'g'd.	Difference.	
22	4.20	4.44	.24	
23	4.20	7.49	3.29	
64	34.35	36.16	1.81	
88	3.00	7.36	4.36	
			——	9.70

Making store bill $1,872.39 instead of $1,882.09.
On bill for September, we notice—

64	31.35	38.46	7.11

Making store bill for Sept. $1,643.24 instead of $1,650.35.

H. B. & B.

(Ex. 5 for Id.)

197 DEFENDANT'S EXHIBIT D.

Certificate of Incorporation of the Federal Contracting Company.

We, the undersigned, all being of full age, citizens of the United States, and residents of the State of New York, desiring to form a stock corporation pursuant to the provisions of the Business Corporations Law, do hereby make, sign, acknowledge and file this certificate for that purpose as follows:—

First. The name of the said corporation is to be The Federal Contracting Company.

Second. The objects and nature of the business for which said corporation is to be formed are: to do a general contracting business; to bid for, take and perform contracts with the United States Government or its officers; with the several States; with municipalities; with foreign countries; and with private parties; to manufacture, purchase, sell and deal in tools, machinery, boats, dredges, scows, materials and supplies and all plant necessary or proper to carry on or conduct such business of general contracting; and to purchase, sell, or otherwise acquire lands and buildings, and to hold and rent the same, and to do any act or thing in any wise connected with said business or appertaining thereto in the State of New York, or in any State, Territory possession or dependency of the United States, or in any other country.

Third. The amount of the capital stock of said corporation
198 is to be Two Million Dollars ($2,000,000.) One Million Dollars ($1,000,000) of said capital stock to be preferred stock, and One Million Dollars ($1,000,000) of said capital stock to be common stock. The preferred stock of said company shall be entitled to a dividend of not exceeding five per cent. in any one year, which dividend shall be non-cumulative, and payable out of the net earnings before any dividend is paid upon the common stock. The holders of the shares of the preferred stock shall not be entitled to vote thereon.

Fourth. The number of shares of which the capital stock shall consist is to *the* ten thousand (10,000) shares of preferred stock of the par value of One hundred Dollars ($100) each, and ten thousand (10,000) shares of the common stock of the par value of One Hundred Dollars ($100) each.

The amount of capital with which the said corporation shall begin business is to be the sum of Five thousand Dollars ($5,000.)

Fifth. Its principal business office is to be located in the City of Albany, County of Albany, State of New York.

Sixth. The duration of said corporation is to be perpetual.

Seventh. The number of Directors of said corporation is to be three (3).

Eighth. The names and post office addresses of the Directors of said corporation for the first year are:

199

Names.	P. O. addresses.
Robert Lawrence	New York City, New York
MacIntosh Kellogg	New York City, New York
Franklin Nevius	Jersey City, New Jersey

Ninth. The names and Post Office addresses of the subscribers, and a statement of the number of shares of stock which each agrees to take in the corporation, are as follows:

Names.	P. O. addresses.	No. shares. Pf'd.	Common.
Robert Lawrence,	New York City, N. Y.	8	8
MacIntosh Kellogg	" "	8	8
Franklin Nevius,	Jersey City, N. J.	9	9

ROBERT LAWRENCE. [SEAL.]
MACINTOSH KELLOGG. [SEAL.]
FRANKLIN NEVIUS. [SEAL.]

STATE OF NEW YORK,
County of New York, ss:

On this 26th day of November, One thousand nine hundred and two, before me personally appeared MacIntosh Kellogg and Franklin Nevius, to me known and known to me to be the individuals described in and who executed the foregoing certificate, and they duly acknowledged to me that they executed the same for the purposes therein set forth.

[SEAL.] JESSIE B. KAY,
Notary Public, 135, *New York Co.*

200 STATE OF NEW YORK,
County of New York, ss:

On this 26th day of November, One thousand nine hundred and two, before me personally appeared Robert Lawrence to me known and known to me to be the individual described in and who executed the foregoing certificate, and he duly acknowledged to me that he executed the same for the purpose therein set forth.

JESSIE B. KAY,
Notary Public, 135, *New York Co.*

STATE OF NEW YORK,
County of New York, ss:

I, Thomas L. Hamilton, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, do hereby certify that Jessie B. Kay, whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument and thereon written, was, at the time of taking such proof or acknowledgment, a Notary Public in and for the County of New York, dwelling in the same County, commissioned and sworn, and duly authorized to take the same; and, further, that I am well acquainted with the handwriting of such notary, and verily believe that the signature to the said certificate of proof or acknowledgment is genuine.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court and County the 28th day of November, 1902.

[SEAL.] THOMAS L. HAMILTON, *Clerk.*

201 STATE OF NEW YORK,
Office of the Secretary of State, ss:

I have compared the preceding with the original certificate of incorporation of The Federal Contracting Company, filed and recorded in this Office on the 29th day of November, 1902, and do hereby certify the same to be a correct transcript therefrom and the whole of said original.

Witness my hand and seal of office of the Secretary of State at the City of Albany this 6th day of April, One thousand nine hundred and three.

[SEAL.] JOHN F. O'BRIEN,
Secretary of State.

DEFENDANT'S EXHIBIT B.

Certificate of Incorporation of Breakwater Construction and Engineering Co.

We, the undersigned, all being persons of full age, citizens of the United States and residents of the State of New York, desiring to form a stock corporation pursuant to the provisions of Business Corporation Law of the State of New York and the several acts supplementary thereto and amendatory thereof for a legal business purpose or purposes other than a moneyed corporation or a corporation provided for by the banking, the insurance, the railroad, and the transportation corporation laws, do hereby make, acknowledge and file this certificate for that purpose.

1. The name of the proposed corporation is

202 "Breakwater Construction and Engineering Co."

2. The purpose or purposes for which it is to be formed are as follows:

To enter into, maintain, conduct, carry on and do a general building, construction and contracting business.

To bid for, obtain, take, make, enter into and perform contracts, undertakings and engagements with the government of the United States or the Territories or dependencies thereof, or any of its or their several offices or departments, or with the governments of the several states, or with their several offices and departments, or with the city, county and state offices, boards and departments, or with foreign empires, kingdoms and governments and the severi offices, boards, departments and offices, or with the municipalities in the several states, or in any of the foreign empires, kingdoms and governments, for the erection and construction of any structure, edifice, works and buildings, private or public, and to make, manufacture, purchase, buy, vend, sell and deal in any and all of the materials, apparatus, machinery, plant and products required in, or incident to, or necessary in the entering into, engagement, performance and carrying out of the matters aforesaid.

To acquire, hold and own by purchase, grant, gift, lease, exchange or otherwise, lands, tenements, hereditaments or any interest therein in the several states of the United States and the territories and de-

pendencies thereof and in any foreign country, and to improve, alter, lay out, change, convert and appropriate any such lands into private or public places and for roads, streets, approaches or other conveniences for said lands.

203 To erect, construct, build, maintain and carry on edifices, factories, buildings, dwellings, houses, structures and works of any and every description, and to rebuild, enlarge and improve existing edifices, factories, buildings, dwellings, houses, structures and works of any and every description.

To lease, let, mortgage, sell, convey or otherwise dispose of lands, tenements, edifices, houses, buildings, factories, structures, works and hereditaments and other real estate and interest therein of the company and to undertake or conduct the leasing, working, management and sale of real estate or of any interest therein.

To purchase, buy, sell, exchange, transfer, traffic and deal in, as well as carry on the business of makers, manufacturers of and dealers in tools, machinery, boats, dredges, scows, apparatus, engines, machines, implements and property, metallic, copper and iron and other work incident to the business hereinbefore mentioned and all articles of machinedy and appurtenances thereto, used in and about the manufacture, maintenance and working thereof and the loan, hire and license thereof, and every part thereof.

To repair, mend, alter, loan and license and deal in apparatus, machines, engines, machinery, materials and articles of all kinds which shall be capable of being used for the purposes of any business herein mentioned or likely to be required by customers or dealers in any such business.

To purchase, obtain, or otherwise acquire letters patent, patent rights, privileges and licenses, improved and secret process for or in any wise relating to all or any of the objects and purposes aforesaid, and to grant, lease, license and permit for the use of, or to sell or otherwise deal in any letters patent, patent rights and privi-

204 leges, improved or secret process acquired by the company for its said business.

To apply for, purchase or otherwise acquide, and to hold, own, use, operate and to sell, assign or otherwise dispose of, to grant licenses in all respects or otherwise turn to account any and all inventions, improvements and process used in connection with or acquired under letters patent of the United States or any foreign country.

To make, enter into, execute, acknowledge, deliver, negotiate, sell, transfer and assign mortgages, deeds of trust, bonds, stocks or other securities and to make the same or any part thereof liens and encumbrances upon the lands, tenements, hereditaments, chattels and other property, real and personal, which this company may have, hold or be interested therein, and to purchase, acquire, hold, dispose of the stocks, bonds and other evidences of indebtedness of any corporation, domestic or foreign, and to issue in exchange therefor its stock, bonds or other obligations, and to guarantee the bonds of any other domestic corporation engaged in the same general line of business.

To do any act or thing in any wise connected with said business or

appurtenant thereto in the State of New York or in any of the states of the United States, or in any territory, possession, or dependency of the United States, or in any foreign empire, kingdom or government.

3. The amount of the capital stock is to be One Million ($1,000,000) Dollars.

4. The number of shares of which the capital stock shall consist shall be ten thousand (10,000) shares of the par or face value of One Hundred ($100) Dollars each, and the amount of the capital with which said corporation will begin business is Fifteen Hundred ($1,500) Dollars.

205 5. The city in which its principal business office is to be located is the Borough of Manhattan, City of New York, State of New York.

6. Its duration is to be perpetual.

7. The number of its directors shall be three (3).

8. The names and post-office addresses of the directors for the first year are:

Names.	Post-office addresses.
Charles L. Brookheim	No. 113 West 138th Street, New York City.
Arthur H. Parkhurst	No. 144 East 17th Street, New York City.
Jerome C. Jackson	No. 20 West 71st Street, New York City.

9. The names and post-office addresses of the subscribers of the certificate, together with a statement of the number of shares of stock which each agrees to take in the corporation, are as follows:

Names.	Post-office addresses.	No of shares.
Charles L. Brookheim	No. 113 West 138th St., New York City	5
Arthur H. Parkhurst	No. 144 East 17th St., New York City	5
Jerome C. Jackson	No. 20 West 71st St., New York City	5

10. The meetings of the board of directors may be held within the State of New York or any of the states of the United States or any foreign country.

206 In witness whereof, we have made, signed, acknowledged and filed this certificate in duplicate the 11th day of October, 1905.

CHARLES L. BROOKHEIM. [L. S.]
ARTHUR H. PARKHURST. [L. S.]
JEROME C. JACKSON. [L. S.]

STATE OF NEW YORK,
County of New York,
City of New York:

On this 11th day of October, 1905, before me personally appeared Charles L. Brookheim, Arthur H. Parkhurst and Jerome C. Jackson, all to me known and known to me to be the individuals described in and who executed the foregoing instrument, and duly and severally acknowledged to me that they executed the same.

HARRY M. GOLDBERG,
Notary Public, N. Y. Co.

207

EXHIBIT F.

(Card.)

Bartlett, Frank.

1903.			
May	25	Cy. of Payroll.....	$106.13
"	"	" " "	658.12
June	27	" " "	981.49
Aug.	25	Ck.....	1,239.60
Oct.	5	"	1,589.56
	29	"	1,000.00
1904.			
Feb.	2	"	872.39
Mar.	21	.....	500.00
June	24	.....	150.00
Aug.	13	.....	200.00
Oct.	11	.....	100.00
1905.			
Jan.	31	.....	100.00
Mar.	1	.....	100.00
	23	.....	100.00
May	10	.....	100.00
Oct.	29	.....	150.00
			$7,947.29

Guilford, Conn.

1903.			
Mar.		Store bill.....	106.13
Apr.		"	658.12
May		"	981.49
June		"	1,239.60
July		"	1,589.56
Aug.		"	1,872.39
Sept.		"	1,643.24
Oct.		Cr. Cash	
		1,601.79	
		149.37	
			1,452.42
Nov.		"	273.47
		Provision bills.....	281.18
		Supplies, June	18.44
		July	67.13
		Aug.	86.10
		Supplies Sept.	169.75
		Oct.	146.14
		Horses 310.50	
		Cr..... 123.00	
			187.50
			10,772.66

Rent from Houses.
Profits due H. B. & B.

EXHIBIT G.

(Card.)

Bartlett, Frank.

1905.			
Nov.	24	Ck. Payroll.....	204.04
1906.			
Jan.	10	" "	1,004.72
Feb.	13	" "	1,333.64
Apr.	5	" "	1,313.11
	24	" "	1,222.91
May	25	" "	1,800.72
June	22	" "	1,264.20
			8,143.34

Guilford, Conn.

'05.			
Oct.	a/c	Supplies	3.44
	25	Provisions	54.24
		Store bill, Oct.....	204.04
Nov.		" Nov.....	1,004.72
		Prov. & Sup.....	8.83
		Freight	4.41
Dec.		Store bill, Dec.....	1,333.64
			2,613.32

208

Exhibit H.

(Card.)

Bartlett, Frank.			Guilford, Conn.		
'05.		8,143.34	1905.		2,613.32
Dec. 1906.	Telephone	9.35	Dec. '06.	Supplies	12.49
July 17	Ck.	1,307.89	Jan.	Store Bill, Jan	1,313.11
Aug. 31	"	1,118.73	"	& Feb. Supplies, etc	73.88
May	Telephone, Feb. & March calls	5.15	Feb.	Store "	1,222.91
	" Apr., May, June	10.42	Mar.	Store " Mar.	1,809.72
	Telegram 7/23			Supplies, etc	107.14
	Deducted from Brauchini in error, (Letter from Rockport)	1.75	Apr.	Store bill	1,264.20
				Supplies, etc	60.62
June a/c	Ex. charged in error	.45	May	Store bill	1,307.89
Sept. 11	Ck.	843.48		Supplies, etc	35.84
				Store bill	1,118.73
				Supplies, etc	45.07
			July	Store bill	843.48
				Supplies, etc	35.49
		11,440.56			11,854.89
Oct. 1	Tel. charges	3.05		Cr.	414.33

Chge. 10% on Store Bill and use of Bldgs., etc., and other items which affect this a/c.

209 United States Circuit Court, Southern District of New York.

UNITED STATES for the Benefit of FRANK P. BARTLETT, Plaintiff,
against
JOHN F. DONOVAN and THE UNITED STATES FIDELITY & GUARANTY CO., Defendants.

Petition for Writ of Error.

And now comes the defendant the United States Fidelity & Guaranty Co. herein by Sumner Bowman, its attorney, and says that on or about the 15th day of June, 1910, this Court entered judgment herein in favor of the plaintiff and against this defendant for $2,960.89, in which judgment and proceedings had prior thereunto in this cause certain errors were committed to the prejudice of this defendant, and whereby this defendant feels itself aggrieved all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this defendant prays this Court for an order allowing said defendant to prosecute a Writ of Error in its behalf to the Honorable, the United States Circuit Court of Appeals for the Second Circuit for the correction of the errors so complained of under and according to the laws of The United States of America in that behalf made and provided, and that a transcript of the record, pro-
210 ceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals, and also that an order may be made fixing the amount of security which the defend-

ant shall give and furnish upon the said writ of error, and that upon the giving of such security all further proceeding in this Court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Second Circuit.

And your petitioner will ever pray.

SUMNER BOWMAN,
Attorney for Defendant, United States Fidelity & Guaranty Co.

(Endorsed:) U. S. Circuit Court, Southern District, N. Y.—Filed Jul- 13, 1910.—John A. Shields, Clerk.

211 *Order Allowing Writ of Error and Fixing Bond.*

At a Term of the United States Circuit Court for the Southern District of New York, Second Circuit, held at the Post Office Building, in said District, in the Borough of Manhattan, on the 13th day of July, 1910.

Present: Honorable E. H. Lacombe, Judge of the U. S. Circuit Court.

UNITED STATES for the Benefit of FRANK P. BARTLETT, Plaintiff,
against
JOHN F. DONOVAN and THE UNITED STATES FIDELITY & GUARANTY CO., Defendants.

This 13th day of July, 1910, came the defendant United States Fidelity & Guaranty Co. by its attorney Sumner Bowman, Esq., and filed herein and presented to the Court its petition praying for the allowance of a Writ of Error and assignment of errors intended to be urged by it, praying also that a transcript of the records and proceedings, and papers upon which the judgment herein was rendered duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Judicial Circuit, that such other
212 and further proceedings may be had as may be proper in the premises.

On consideration whereof the Court does allow the Writ of Error upon the defendant United States Fidelity & Guaranty Co., giving bond according to law in the sum of $3,570.00, which shall operate as a supersedeas bond, and it is accordingly

Ordered that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Second Circuit the judgment heretofore entered herein on June 15, 1910, and it is

Further ordered, that the amount of bond on said writ of error be, and the same hereby is, fixed at three thousand five hundred and seventy ($3,570.00) dollars, and that upon the making and filing with the Clerk of this Court of a good and sufficient bond in said sum by the said defendant, the United States Fidelity and Guaranty

Company, all further proceedings be superseded and stayed until the final determination of said writ of error by the said United States Circuit Court of Appeals for the Second Circuit and until the further order of this Court.

E. H. LACOMBE, *U. S. J.*

(Endorsed:) U. S. Circuit Court, Southern District, N. Y.—Filed Jul- 13, 1910.—John A. Shields, Clerk.

213 United States Circuit Court for the Southern District of New York, Second Circuit.

UNITED STATES FIDELITY & GUARANTY CO., Plaintiff in Error (Defendant Below),

against

THE UNITED STATES for the Benefit of FRANK P. BARTLETT, Defendant in Error (Plaintiff Below), and JOHN F. DONOVAN, Defendant in Error (Defendant Below).

Assignment of Errors of the Plaintiff in Error, United States Fidelity & Guaranty Company.

And now comes the plaintiff-in-error, the United States Fidelity & Guaranty Co. herein, by Sumner Bowman, its attorney, and respectfully submits and presents and files its assignment of the errors complained of and says:

That in the records and proceedings of the Honorable Court in the above-entitled cause, on the trial thereof, there is manifest error to the injury and prejudice of the said plaintiff in error, the United States Fidelity & Guaranty Co., and for such error the said plaintiff in error assigns the following:

First. For that the learned United States Circuit Court for
214 the Southern District of New York erred in denying the motion of the plaintiff in error upon the trial herein to dismiss the complaint because the Court had no jurisdiction, and to which ruling the plaintiff in error excepted.

Second. For that the said Learned United States Circuit Court erred in denying the motion of the plaintiff in error made upon the trial herein to dismiss the complaint because it has not stated facts sufficient to constitute a cause of action, to which ruling of the Learned Court the plaintiff in error excepted.

Third. For that the said United States Circuit Court erred in denying the motion of the plaintiff in error made upon the trial herein for judgment on the pleadings because they are inconsistent on the record as it stands, there being no replication to which ruling of the Learned Court the plaintiff in error excepted.

Fourth. For that the United States Circuit Court erred in admitting evidence on the part of the defendant in error, United States for the benefit of Frank P. Bartlett, upon the trial, and in overruling the objection of counsel for the plaintiff in error to the following

question put by counsel for the defendant in error to the witness Frank P. Bartlett:

"About how many men did you have at Sachem's Head"?

And upon exception thereto by the plaintiff in error in answer to which said question said witness was permitted to testify as follows:

"From 75 to 125."

Fifth. That the said Court erred in admitting evidence on the part of the defendant in error, United States for the benefit of
215 Frank P. Bartlett, upon the trial, and in overruling the objection of counsel for plaintiff in error to the following question put by counsel for defendant in error to the witness Frank P. Bartlett:

"These men, would they be provided with cooks?"

In answer to which question said witness was permitted to testify, after exception by counsel for plaintiff in error, as follows:

"Yes."

Sixth. That the said Court erred in admitting evidence on the part of the defendant in error, United States for the benefit of Frank P. Bartlett, upon the trial, and in overruling the objection of counsel for plaintiff in error to the following question put by counsel for defendant in error to the witness Frank P. Bartlett:

"And you saw these laborers daily?"

In answer to which question said witness was permitted to testify after exception by counsel for the plaintiff in error as follows:

"Yes, sir."

Seventh. That the said Court erred in admitting evidence on the part of the defendant in error, United States, for the benefit of Frank P. Bartlett, upon the trial, and in overruling the objection of counsel for plaintiff in error to the following question put by counsel for defendant in error to the witness Frank P. Bartlett:

"Can you state to the jury upon how many occasions at the end of each month, you were present when these various laborers assigned their wages * * * only at the time you were present?"

216 In answer to which question said witness was permitted to testify after exception by counsel for plaintiff in error as follows:

"Every month, every pay day."

Eighth. For that the said Court erred in admitting evidence on the part of the defendant in error and in overruling the objection of counsel for plaintiff in error to the following question put by counsel for defendant in error to the witness Frank P. Bartlett, the said objection being on the ground that it embodied a conclusion and the issue in the case, and also upon the ground that it was incompetent, immaterial and insufficient to establish an assignment of the wages:

"What were they known as, by names or numbers?"

In the following connection—

"A. How were these laborers designated?"

"A. How, what?"

In answer to which question said witness was permitted to testify after exception by counsel for the plaintiff in error, as follows:

"By name and number."

Ninth. For that the said Court erred in admitting evidence on the part of the defendant in error and in overruling the objection of counsel for plaintiff in error to the following question put by counsel for defendant in error to the witness Frank P. Bartlett, the said objection being on the ground that it is leading and calls for a conclusion.

"Would the bills that would be sent to Hughes Brothers and Bangs each month be made up from this book?"

217 The connection in which the question is asked is —

"Q. I ask you to look at that book, and state what book that is? Is that the book that Tofli kept?"

"A. Yes."

In answer to which question said witness was permitted to testify, after exception by counsel for the plaintiff in error, as follows:

"A. Yes."

Tenth. That the said Court erred in admitting evidence on the part of the defendant in error United States for the benefit of Frank P. Bartlett, upon the trial, and in overruling the objection of counsel for plaintiff in error to the following question put by the Court to the witness Frank P. Bartlett:

"Did you make up your bill from that book that you sent to Mr. Bangs?"

In answer to which question said witness was permitted to testify, after exception by counsel for plaintiff in error, as follows:

"Yes. This is the memorandum that we sent to Mr. Bangs."

Eleventh. That the said Court erred in denying the motion of counsel for the plaintiff in error to strike out from the record the following question and answer because it did not appear that the witness Frank P. Bartlett did it, and because it did not in fact appear upon the record what that book was nor what the witness did, and to which ruling the plaintiff in error excepted.

"Q. You made them up from that?"

"A. Yes."

218 Twelfth. That the said Court erred in admitting evidence on the part of the defendant in error United States for the benefit of Frank P. Bartlett, upon the trial, and in overruling the objection of counsel for plaintiff in error to the following question put by the court to the witness Frank P. Bartlett, as follows:

"You made them up from that book?"

In answer to which question said witness was permitted to testify, after exception by counsel for plaintiff in error, as follows:

"Yes."

Thirteenth. That the said Court erred in admitting evidence on the part of the defendant in error United States for the benefit of Frank P. Bartlett, upon the trial, and in overruling the objection of counsel for plaintiff in error to the following question put by the Court to the witness Frank P. Bartlett:

"What became of your other books?"

In answer to which question said witness was permitted to testify, after exception by counsel for plaintiff in error, as follows:

"I had them up at the Commissary's and the Company went up there and brought them down and burned down all the books."

Fourteenth. That the Learned Court erred in admitting evidence on the part of the defendant in error, United States, for the benefit of Frank P. Bartlett, upon the trial, and in overruling the objection of counsel for plaintiff in error to the following question put by the Court to the witness Frank P. Bartlett:

219 "Did you make that book annexed to the depositions?"

In the following connection—

"Q. I show you another book and ask you what kind of a book that is?"

"A. That is the Journal, 1903."

In answer to which question said witness was permitted to testify, after exception by counsel for plaintiff in error, as follows:

"A. Yes, that is copied from this. That would be the day book."

Fifteenth. That the said Court erred in denying the motion of the counsel for the plaintiff in error to strike out a portion of the answer of the witness Alexander Tolli read from a deposition taken de bene esse and read at the trial and erred in admitting said evidence on the part of the defendant in error: United States for the benefit of Frank P. Bartlett upon the trial and in denying the motion of counsel for plaintiff in error to strike out all of the answer to the following question put by counsel for defendant in error to the said witness Alexander Tolli, excepting the word "no."

The following is the question put by counsel for defendant in error:

"Now, at the time, how would these laborers purchase these supplies at the store, would they pay cash or not?

"No."

Counsel for plaintiff in error moved to strike out the rest of the answer of the said witness as it appeared in the deposition, but the Court allowed the said answer and denied the motion of coun-

220 sel for plaintiff in error to strike out the balance thereof, to which exception was duly taken. The said balance of said answer being as follows:

"I have to put down everything in the book, you know, where they come to buy, board bill, you know, you know, provisions, and the checks just the same, you know, because some people they have some families, have a cook, you know, and boarding house, you know, so just the same as boarding house, and the last of the month they pay sometimes ten dollars a month, eleven dollars a month, you know, and I have to put it down, the checks, you know, some provisions, tobacco, and something else, you know, and we have to make the last of the month, the end of the month they have got to pay, and the last of the month; you understand what I mean."

Sixteenth. That the said Court erred in overruling the objection of counsel for plaintiff in error to the following question put by counsel for defendant in error to the witness Alexander Toffi:

"Q. And these amounts you would get from the figures you entered day by day into this book, the amount of the tickets?"

In the following connection:

"Q. At the end of the month how would you total up the amount of purchases each laborer had made during the month?

"A. Yes.

"Q. What would you do?

"A. Well, I had to put it down in my book, you know, how much they have to pay.

221 "Q. What?

"A. I have to put down in my book how much they have to pay for board, for checks, how many dollars they have to pay for board, wherever they board in a family, you know, because the provisions was all just the same as provisions in the store, and some of the checks for shoes, pair of pants, tobacco, you know, or provisions, so many checks, something for board and for rent, and I have to put it down; sometimes ten, fifteen and twenty dollars for last of month, that is all."

In answer to which question said witness was permitted to testify, after exception by counsel for plaintiff in error, as follows:

"A. Yes."

Seventeenth. That the said Court erred in overruling the objection of counsel for plaintiff in error to the following question put by counsel for defendant in error to the witness Alexander Tolli:

"Q. That was sent each month to Hughes Brothers & Bang?"

In the following connection:

"Q. Now, at the end of the month would you make up a list of the amounts purchased by the laborers?

"A. Yes."

In answer to which question said witness was permitted to testify, after exception by counsel for plaintiff in error, as follows:

"Yes."

222 Eighteenth. That the Court erred in admitting evidence on the part of the defendant in error, United States for the benefit of Frank P. Bartlett, upon trial, and in overruling the objection of counsel for plaintiff in error to the following question put by counsel for defendant to the witness Alexander Tolli:

"On Hughes Brothers & Bangs payroll, how would it appear, would there appear numbers or the names of the men?"

In answer to which question said witness was permitted to testify, after exception by counsel for plaintiff in error, as follows:

"Well, Hughes Brothers & Bangs payroll, I have to use numbers, I don't never use no names, but I have to send down the name too.

Nineteenth. That the said Court erred in overruling the objection of counsel for plaintiff in error to the following question put by counsel for defendant in error to the witness Alexander Tolli:

"The amount which each laborer had purchased during the month."

In the following connection—

"Q. This is a book which contains entries, the account of each month?"

"A. Yes."

In answer to which question said witness was permitted to testify, after exception by counsel for plaintiff in error, as follows:

"A. Yes."

223 Twentieth. That the said Court erred in admitting evidence on the part of the defendant in error United States for the benefit of Frank P. Bartlett, upon the trial, and in overruling the objection of counsel for plaintiff in error to the following question put by counsel for defendant in error to the witness Alexander Toffi:

"And that book there is a true account each month of what each laborer purchased at the store?"

In answer to which question said witness was permitted to testify, after exception by counsel for plaintiff in error, as follows:

"A. Yes, that is right."

Twenty-first. That the said Court erred in admitting evidence on the part of the defendant in error United States for the benefit of Frank P. Bartlett, upon the trial, and in overruling the objection of counsel for plaintiff in error to the following question put by counsel for defendant in error to the witness Alexander Toffi:

"And from that the bills were sent to Hughes Brothers & Bangs?"

In answer to which question said witness was permitted to testify, after exception by counsel for plaintiff in error, as follows:

"Yes, sir."

Twenty-second. That the said Court erred in admitting evidence on the part of the defendant in error United States for the benefit of Frank P. Bartlett, upon the trial, and in overruling the

224 objection of counsel for plaintiff in error to the following question put by counsel for defendant in error to the witness Alexander Toffi:

"Now, these men you have just stated, all of those men were engaged in the quarry."

In answer to which question said witness was permitted to testify, after exception by counsel for plaintiff in error, as follows:

"Yes."

Twenty-third. That the said Court erred in admitting evidence on the part of the defendant in error United States for the benefit of Frank P. Bartlett, upon the trial, and in overruling the objection of counsel for plaintiff in error to the following question put by counsel for defendant in error to the witness Alexander Toffi:

"See if we understand each other. The book that you hold in your hand is a book that you made entries in from time to time and they are all in your handwriting?"

In answer to which question said witness was permitted to testify, after exception by counsel for plaintiff in error, as follows:

"Yes."

Twenty-fourth. That the said Court erred in overruling the objection of counsel for plaintiff in error to the following question put by counsel for defendant in error to the witness Alexander Toffi:

"Q. And it is correct?"

225 In the following connection—

"Q. See if we understand each other. The book that you hold in your hands is a book you made entries in from time to time and they are all in your handwriting?"

In answer to which question said witness was permitted to testify, after exception by counsel for plaintiff in error, as follows:

"Yes."

Twenty-fifth. That the said Court erred in overruling the objection of counsel for plaintiff in error to the following question put by counsel for defendant in error to the witness Alexander Tofli:

"Q. I show you another slip and ask you who you received that from:

In the following connection—

"Q. I will ask you to look at this slip and ask you who you received that slip from?"

"A. This letter here?"

In answer to which question said witness was permitted to testify, after exception by counsel for plaintiff in error, as follows:

"I got it from Hughes Brothers & Bangs."

Twenty-sixth. That the said Court erred in overruling the objection of counsel for plaintiff in error to the following question put by counsel for defendant in error to the witness Alexander Tofli:

"Q. And that also contains the deductions?"

226 In connection with the questions noted in the previous assignment of error.

In answer to which question said witness was permitted to testify, after exception by counsel for plaintiff in error, as follows:

"A. Yes."

Twenty-seventh. That the said Court erred in overruling the objection of counsel for plaintiff in error to the following question put by counsel for defendant in error to the witness Alexander Tofli:

"Q. And corrections made by Hughes Brothers & Bangs?"

In connection with the questions noted in the two previous assignments of error.

In answer to which question said witness was permitted to testify, after exception by counsel for plaintiff in error, as follows:

"A. Yes."

Twenty-eighth. That the said Court erred in admitting evidence on the part of the defendant in error upon the trial, and in overruling the objection of counsel for plaintiff in error to the admission in evidence of the yellow slip pinned to the March account with Hughes Brothers & Bangs. The full substance of the evidence admitted being the proof that Hughes Brothers & Bangs examined the accounts received from the witness each month, corrected, and then sent a slip of such corrections back to this witness. The said slip pinned to the March account reading in full as follows:

227 *Deductions.*

March, 1903.

Less deductions:			Total $108.99
	16	$1.31	
	28	1.55	2.86
			$106.13

Twenty-ninth. That the said Court erred in admitting evidence on the part of the defendant in error upon the trial, and in overruling the objection of counsel for plaintiff in error to the admission in evidence of the yellow slip pinned to the May account, with Hughes Brothers & Bangs. The full substance of the evidence admitted being the proof that Hughes Brothers & Bangs examined the accounts received from the witness each month, corrected, and then sent a slip of such corrections back to this witness. The said slip pinned to the May account reading in full as follows:

May, 1903.

Less deductions:			Total $1,105.40
	4	$4.20	
	5	3.25	
	9	.98	
	12	2.75	
	21	3.53	
	23	1.45	
	24	2.25	
	26	4.03	
	27	24.35	
	35	7.23	
	36	21.66	
	38	3.14	
	42	5.12	
	45	5.35	
	48	.65	
228	49	3.39	
	50	12.80	
	51	2.63	
	52	12.85	
	53	.90	
	54	.70	
	55	.70	
		——123.91	
			$981.49

Thirtieth. That the said Court erred in admitting evidence on the part of the defendant in error upon the trial, and in overruling the objection of counsel for plaintiff in error to the admission in evidence of the yellow slip pinned to the April account with Hughes Brothers

& Bangs. The full substance of the evidence admitted being the proof that Hughes Brothers & Bangs examined the accounts received from the witness each month, corrected and then sent a slip of such corrections back to this witness. The said slip pinned to the April account reading in full as follows:

April, 1903.

Less deductions:			Total $695.35
	8	$2.45	
	10	1.30	
	24	1.25	
	27	.50	
	35	2.03	
	36	4.41	
	37	2.63	
	38	5.63	
	39	2.63	
	40	2.63	
229	41	4.63	
	42	7.14	
		——37.23	
			$658.12

Thirty-first. That the said Court erred in overruling the objection of counsel for plaintiff in error to the following question put by counsel for defendant in error to the witness Alexander Tolli:

"Q. Now turn over to the next one, the month of July, did you receive a piece of paper at the end of July to correct the pay roll in connection with the correction slips alleged to have been received from Hughes Brothers & Bangs and referred to in the three previous assignments of error."

In answer to which question said witness was permitted to testify, after exception by counsel for plaintiff in error, as follows:

"A. Yes."

Thirty-second. That the said Court erred in admitting evidence on the part of the defendant in error United States for the benefit of Frank P. Bartlett, upon the trial, and in overruling the objection of counsel for plaintiff in error to the following question put by counsel for defendant in error to the witness Alexander Tolli:

"Q. I show you a piece of paper and ask you where did that paper come from?"

In answer to which question said witness was permitted to testify, after exception by counsel for plaintiff in error, as follows:

230 "A. Come from Hughes Brothers & Bangs."

Thirty-third. That the said Court erred in admitting evidence on the part of the defendant in error upon the trial, and in overruling the objection of counsel for plaintiff in error to the admission in evidence of the yellow slip pinned to the August and September account with Hughes Brothers & Bangs. The full substance of the evidence admitted being the proof that Hughes Brothers & Bangs

examined the accounts received from the witness each month, corrected, and then sent a slip of such corrections back to this witness. The said slip pinned to the August and September account reading in full as follows:

August, 1903.

Less deductions:			Total $1,882.09
	22	$ .24	
	23	3.29	
	64	1.81	
	88	4.26	
		——9.70	
			$1,872.39

September, 1903.

Less deductions:			Total $1,650.35
	64	$7.11	7.11
			$1,643.24

Thirty-fourth. That the said Court erred in overruling the objection of counsel for plaintiff in error to the following question put by counsel for defendant in error to the witness Alexander Tolli:

231 "Q. And they got their supplies from the store?

In the following connection—

"Q. And these men were depositing stone upon the breakwater?

"A. Yes, on the breakwater."

In answer to which question said witness was permitted to testify, after exception by counsel for plaintiff in error, as follows:

"A. Yes, sure."

Thirty-fifth. That the said Court erred in admitting evidence on the part of the defendant in error, United States for the benefit of Frank P. Bartlett, upon the trial, and in overruling the objection of counsel for plaintiff in error to the following question put by counsel for defendant in error to the witness Frank P. Bartlett:

"Q. In fact some time, between the first of the month and the 10th of the month, before the bills were sent to Hughes Brothers & Bangs, these men would come in some time during that time and check up their accounts?"

In answer to which question said witness was permitted to testify, after exception by counsel for plaintiff in error, as follows:

"A. Yes. Would come and see everything."

Thirty-sixth. That the said Court erred in overruling the objection of counsel for plaintiff in error to the following question put by counsel for defendant in error to the witness Alexander Tolli:

232 "Q. Was that time check cashed in by you?"

In the following connection—

"Q. I show you a piece of paper and ask you what it is?"

"A. Yes."

"Q. What is it?

"A. That is a time check."

In answer to which question said witness was permitted to testify, after exception by counsel for plaintiff in error, as follows:

"A. Yes."

Thirty-seventh. That the said Court erred in admitting evidence on the part of the defendant in error upon the trial, and in overruling the objection of counsel for plaintiff in error to the admission in evidence of the time check, the full substance of the evidence admitted being proof of length of time and the place where a laborer had worked, together with the amount of salary he was entitled to receive and deductions made by the witness. The said check reading in full as follows:

Time Check.
Sachem's Head Quarry.
Date Nov. 8th, 1903.

No. 1.

Time from Nov. 1st to 8th, inclusive, 8 Days at $2.50 per day	$20.00
Deductions	7.64
Total	$12.36

HUGHES BROS. & BANGS.
Per T. W. MAYO.

Not transferable.

233 Thirty-eighth. That the said Court erred in overruling the objection of counsel for plaintiff in error to the following question put by counsel for defendant in error to the witness Alexander Tolli:

"Q. That would be the amount that would be paid him in connection with the time check and the deductions appearing thereon, referred to in the previous assignment of error?"

In answer to which question said witness was permitted to testify, after exception by counsel for plaintiff in error, as follows:

"A. Yes, $12.36.

Thirty-ninth. That the said Court erred in overruling the objection of counsel for plaintiff in error to the following question put by counsel for defendant-in-error to the witness Alexander Tolli:

"Q. That would be the amount paid the laborer?"

In the following connection—

"Q. That would be the amount that would be paid him?"

"A. This $12.36."

In answer to which question said witness was permitted to testify, after exception by counsel for plaintiff in error, as follows:

"A. What we have to pay the laborer, pay the laborer you know for the Company."

Fortieth. That the said Court erred in admitting evidence 234 on the part of the defendant in error upon the trial and in overruling the objection of counsel for plaintiff in error to the admission in evidence of the yellow slip pinned to the June and July account with Hughes Brothers & Bangs. The full substance of

the evidence admitted being the proof that Hughes Brothers & Bangs examined the accounts received from the witness each month, corrected, and then sent a slip of such corrections back to this witness. The said slip pinned to the June and July account reading in full as follows:

June, 1903.

Less deductions:			Total $1,303.17
	1	$2.05	
	12	10.53	
	23	4.49	
	24	8.64	
	27	2.31	
	42	2.37	
	49	9.52	
	57	.50	
	58	2.75	
	59	1.80	
	62	2.49	
	63	1.70	
	Bugliani	5.00	
	A. Lasca	4.00	
			63.57
			$1,239.60

July, 1903.

Less deductions:			Total $1,616.36
	21	$3.82	
	23	.20	
	27	4.21	
235	28	4.62	
	45	3.82	
	49	7.52	
	57	1.00	
	79	1.15	
	88	.46	
			26.80
			$1,589.56

Forty-first. That the said Court erred in admitting evidence on the part of the defendant in error United States for the benefit of Frank P. Bartlett upon the trial, and in overruling the objection of counsel for plaintiff in error to the following question put by counsel for defendant in error to the witness John F. Donovan:

"Q. And were you an officer of the Breakwater Company?"

In answer to which question said witness was permitted, after exception by counsel for plaintiff in error, to testify as follows:

"A. Yes, sir. I am Second Vice-President."

Forty-second. That the said Court erred in admitting evidence on the part of the defendant in error United States for the benefit of

Frank P. Bartlett upon the trial, and in overruling the objection of counsel for plaintiff in error to the following question put by counsel for defendant in error to the witness John F. Donovan:

"Q. What are you now?"

In answer to which question said witness was permitted to testify, after exception by counsel for plaintiff in error, as follows:

236 "A. Second Vice-President."

Forty-third. That the said Court erred in admitting evidence on the part of the defendant in error United States for the benefit of Frank P. Bartlett upon the trial, and in overruling the objection of counsel for plaintiff in error to the following question put by counsel for defendant in error to the witness John F. Donovan:

"Q. Did you personally carry out the work of the Point Judith Breakwater?"

In answer to which question said witness was permitted to testify, after exception by counsel for plaintiff in error, as follows:

"A. No."

Forty-fourth. That the said Court erred in admitting evidence on the part of the defendant in error United States for the benefit of Frank P. Bartlett upon the trial, and in overruling the objection of counsel for plaintiff in error to any conversation between the witness John F. Donovan and Frank P. Bartlett, to which ruling counsel for plaintiff in error duly excepted.

Forty-fifth. That the said Court erred in overruling the objection of counsel for plaintiff in error to the following question put by counsel for defendant in error to the witness John F. Donovan:

"Q. You may state what was said between you?"

In the following connection—

"Mr. MYERS: I object to any conversation between this
237 witness and Mr. Bartlett."

In answer to which question said witness was permitted to testify, after exception by counsel for plaintiff in error, as follows:

"A. He said he would like to take up the question of furnishing labor and handling the commissary and furnishing supplies to the men at the quarry, and he understood I had received the contract. I told him that while I had received the contract it was awarded to me and that Hughes Brothers & Bangs were going to carry on the work, and I would have to talk the matter over with Mr. Bangs and go into the matter as to whether he was willing or not; that I was to have practical charge of that eastern work and that it was necessary to talk it over with Mr. Bangs and see what sort of proposition we could make with Mr. Bartlett, and what we could do about it. I talked with Mr. Bangs. I am not sure that I talked with him in Bartlett's presence, but he came back after a few days and wanted to know what we were going to do, and I told him it was all right, that we would let him run the commissary, and that he should furnish us each month a list of the men, the amounts of money their accounts amounted to at the store, and that he would arrange to have the amount so assigned by the men deducted from the payroll when it was sent in by our time-keeper, and that if any men bought more than their account showed, we would not be responsible. In other

words, if a man only worked four or five days and Bartlett allowed him to run up $20 worth, we would not be responsible for it. That was about the conversation that I had with him at that time;
238 and I talked with him and made the arrangement with him on the understanding."

Forty-sixth. That the Court erred in admitting evidence on the part of the defendant in error, United States for the benefit of Frank P. Bartlett, upon the trial, and in denying the motion of counsel for plaintiff in error to strike out from the answer of the witness John F. Donovan to the following question put to him by counsel for the defendant in error:

"Q. You may state what was said between you."

The following answer:

"And made the arrangement with him on the understanding * * * and on that basis he started in to furnish the supplies and men for the commissary store. It was also arranged that he was to get us men."

To which ruling counsel for plaintiff in error duly excepted.

Forty-seventh. That the said Court erred in admitting evidence on the part of the defendant in error, United States for the benefit of Frank P. Bartlett, upon the trial, and in overruling the objection of counsel for plaintiff in error to the following question put by counsel for defendant in error to the witness John F. Donovan:

"Q. Just state how Bartlett would send his list of account and charges made at the quarry?"

In answer to which question said witness was permitted to testify after exception by counsel for plaintiff in error, as follows:
239 "At the end of each month, as soon after as it was possible, the time sheets would be sent in first by our quarry from the time keeper; the quarry would send in the time sheets. This time sheet had the time of the men and the wages and the amount was figured and there was a column left for deductions, which deductions—it was simply marked deductions. We did that every month. About the 8th or the 10th of the month, or at least the store, Bartlett would send in the list of the amounts of money, the amount of goods purchased by these various men——"

Forty-eighth. That the said Court erred in admitting evidence on the part of the defendant in error, United States for the benefit of Frank P. Bartlett, upon the trial, and in overruling the objection of counsel for plaintiff in error to the witness John F. Donovan:

"Q. Was a separate account kept of Bartlett's account, expense, freight account, etc.?"

In answer to which question said witness was permitted to testify after exception by counsel for plaintiff in error as follows:

"A. Yes, sir."

Forty-ninth. That the said Court erred in admitting evidence on the part of the defendant in error, United States for the benefit of Frank P. Bartlett, upon the trial, and in denying the motion of counsel for plaintiff in error to strike out the following answer made by the witness John F. Donovan to the following question put by counsel for defendant in error:

"Q. No recollection as to any discussion about repairs or who paid for them?"

240 "A. I am not sure whether it was the next contract in 1905 or this one which came two years later; there was a lot of discussion."

To which ruling of the Learned Court counsel for plaintiff in error duly excepted.

Fiftieth. That the said Court erred in sustaining the objection of counsel for the defendant in error, United States for the benefit of Frank P. Bartlett, upon the trial to the following question put to the witness John F. Donovan; one of the defendants in the Court below, by counsel for the plaintiff in error, and to which ruling the counsel for plaintiff in error duly excepted.

"Q. Do you know how Mr. Norris could get any copy of entries out of the books of Hughes Brothers & Bangs or the Federal Contracting Company, other than through you?"

Fifty-first. That the said Court erred in sustaining the objection of counsel for the defendant in error, United States for the benefit of Frank P. Bartlett, upon the trial to the following question put to the witness John F. Donovan, one of the defendants in the Court below, by counsel for the plaintiff in error, and to which ruling the counsel for plaintiff in error duly excepted.

"Q. Do you know how Mr. Norris could come into possession of them except through you?" The above question being asked in connection with the following:

"Did you make copies of the card ledger?"

"A. No, if I did I would know the exact amount that was due him."

241 Fifty-second. That the said Court erred in the following statement made by it in the course of the trial and in the presence and hearing of the Jury, and to which statement counsel for plaintiff in error duly excepted, the statement made by the Court being as follows:

"There has been no account shown him as far as you have gone."

The said statement being made by the Court at the conclusion of the following question put to the witness, John F. Donovan, by counsel for plaintiff in error, and by reason of which statement of the said Court the witness was not permitted to answer the said following question:

"The account of Frank P. Bartlett I have shown you. I ask you now if you have made any statement as to the account I have shown you, whether the account was paid?"

To which ruling of the Learned Court counsel for plaintiff in error duly excepted.

Fifty-third. That the said Court erred in sustaining the objection of counsel for the defendant in error, Frank P. Bartlett to the admission in evidence on the part of the plaintiff in error of a certain account of Frank P. Bartlett. The full substance of the evidence excluded being a certain statement of account of the defendant in error, Frank P. Bartlett, reading in full, as follows:

242

Bartlett, Frank.

1903.			
May	25	Cg. on Payroll	106.13
"	"	" " "	658.12
Jun-	27	" " "	981.49
Aug.	25	Ck	1,239.60
Oct.	7	"	1,589.56
	29	"	1,000.00
1904.			
Feb.	2	"	872.39
Mar.	21		500.00
Jun-	24		150.00
Aug.	13		200.00
Oct.	11		100.00
1905.			
Jan.	31		100.00
Mar.	1		100.00
	23		100.00
		Forward	7,897.29

(Indorsed on back.)

1905.			
		Forward	7,897.29
May	10		100.00
Oct.	20		150.00
			7,947.29

Guilford, Conn.

1903.				
Mar.	Store Bill			106.13
Apr.	"			658.12
May	"			981.49
Jun	"			1,239.60
July	"			1,589.56
Aug.	"			1,872.39
Sept.	"			1,643.24
			1,601.79	
Oct.	Less cash	149.37		
				1,452.42
Nov.	"			273.47
	Provision Bills			281.18
	Supplies Jun-			18.44
	" Jul-			67.13
	Aug.			86.10
	Forward			10,269.27
	Forward			10,269.27
	Supplies Sep.			169.75
	Oct.			146.14
				10,585.16
	Horses	310.50		
	Cr.	123.00		
				187.50
				10,772.66

Rent for House.
Profits due H. B. & B.

243 Fifty-fourth. That the said Court erred in admitting evidence on the part of the defendant in error, United States for the benefit of Frank P. Bartlett, upon the trial, and in over ruling the objection of counsel for plaintiff in error to the following question put by counsel for defendant in error to the witness John F. Donovan:

"Q. Mr. Donovan, at the time of the Point Judith contract in 1905, did you have a conversation with Mr. Bartlett as to running the store?"

In answer to which question said witness was permitted to testify, after exception by counsel for plaintiff in error, as follows:

"A. Yes, sir, we talked again on the question of his having the commissary at Sachem's Head.

Fifty-fifth. That the said Court erred in admitting evidence on the part of the defendant in error United States for the benefit of Frank P. Bartlett, upon the trial, and in over ruling the objection of counsel for plaintiff in error to the following question put by counsel for defendant in error to the witness John F. Donovan:

"Q. What was the arrangement as to the commissary?

In answer to which question said witness was permitted to testify, after exception by counsel for plaintiff in error, as follows:

"A. He was to run the commissary again, and he said that we still owed him considerable money on the old account and wanted

to know how he was going to be sure to get his money on
244 the second account, and how he was going to get his money.
I told him we would try and pay more promptly. I also told him on this contract that the company should get something out of it. In other words, that we did not propose to have a commissary when we would run it ourselves and make a little money on it ourselves, and out of that contract we would have to take some percentage, something about a deduction, the percentage that was to be made at that time."

Fifty-sixth. That the said Court erred in admitting evidence on the part of the defendant in error United States for the benefit of Frank P. Bartlett, upon the trial, and in over ruling the objection of counsel for plaintiff in error to the following question put by the Court to the witness John F. Donovan upon the ground that it could not bind Hughes Brothers & Bangs.

"Q. Was anything said to you by him or you to him about the contract as to payments which were to be made in the future?"

In answer to which question said witness was permitted to testify, after exception by counsel for plaintiff in error, as follows:

"Yes, sir, that we should try to pay him more promptly."

Fifty-seventh. That the said Court erred in admitting evidence on the part of the defendant in error United States for the benefit of Frank P. Bartlett, upon the trial, and in over ruling the objection of counsel for plaintiff in error to the following question put
245 by the Court to the witness John F. Donovan:

"Q. Did you say anything to him about the payments which were to be made after October, 1908, whether they were to apply on the first or second contract, and if so, what?

In answer to which question said witness was permitted to testify, after exception by counsel for plaintiff in error as follows:

"A. That we should start in on this contract and try and pay him month by month as far as we could."

Fifty-eighth. That the said Court erred in over ruling the objection of counsel for plaintiff in error to the following question put by the Court to the witness John F. Donovan:

"Q. Can you state, Mr. Donovan, what time of the year he severed his connection with Hughes Brothers & Bangs and the Federal Contracting Company?"

In connection with the employment of Mr. Bartlett.

In answer to which question said witness was permitted to testify, after exception by counsel for plaintiff in error, as follows:

"A. I think it was right after the commencement of the second contract, if I remember."

Fifty-ninth. That the said Court erred in overruling the
246 objection of counsel for plaintiff in error to the following question put by the Court to the witness John F. Donovan:

"Q. What was his salary per month?"

In connection with the employment of Mr. Bartlett—

In answer to which question said witness was permitted to testify, after exception by counsel for plaintiff in error, as follows:

"A. Up to the time that he was succeeded by another party as

superintendent, I should think was either $100 per month or $150, I think it was $100 a month."

Sixtieth. That the said Court erred in sustaining the objection of counsel for defendant in error, Frank P. Bartlett, to the following question put to the witness, John E. Irwin by counsel for plaintiff in error:

"Q. Were the entries there made at the time of the items, or when the items were charged against the firm and the company?"

To which ruling of the learned Court counsel for plaintiff in error duly excepted.

Sixty-first. That the said Court erred in sustaining the objection of counsel for the defendant in error, Frank P. Bartlett, to the admission in evidence of certain card ledgers. The full substance of the evidence rejected being proof of the account with Hughes Brothers & Bangs and Frank P. Bartlett as evidenced by these certain card ledgers; the said card ledgers reading in full as follows:

247

Exhibit G.

Bartlett, Frank.

1905.				
Nov.	24	Ck.	Payroll	204.64
1906.				
Jan.	10	"	"	1,004.72
Feb.	13	"	"	1,333.64
Apr.	5	"	"	1,313.11
	24	"	"	1,222.91
May	25	"	"	1,800.72
Jun.	22	"	"	1,264.20
		Forward		8,143.34

Guilford, Conn.

'05.			
Oct.	a/c	Supplies	3.44
	25	Provisions	54.24
		Store bill, Oct.	204.64
Nov.		" Nov.	1,004.72
		Prov. & Sup.	8.83
		Freight	4.41
Dec.		Store bill	1,333.64
		Forward	2,613.32

Exhibit H.

(Front of Card.)

	Bartlett, Frank.	
'05.		8,143.34
Dec.	Telephone	9.35
1906.		
Jul. 17	Ck.	1,307.89
Aug. 31	"	1,118.73
	Feb. & March	
May	Telephone calls	5.15
	" (Apr., May, Jun.)	10.42
	Telegram 7/23	
	Forward	10,594.88

	Guilford, Conn.	
1905.		2,613.32
Dec.	Supplies	12.49
'06.		
Jan.	Store Bill, Jan.	1,313.11
Jan. & Feb.	Supplies, etc.	73.88
Feb.	Store " Feb.	1,222.91
Mar.	Store " Mar.	1,800.72
	Supplies, etc.	107.14
Apr.	Store Bill.	1,264.20
	Supplies, etc.	60.62
May	Store Bill.	1,307.89
	Supplies, etc.	35.84
June	Store Bill.	1,118.73
	Supplies, etc.	45.07
	Forward	10,975.92

(Back of Card.)

	Forward	10,594.88	'06.	Forward	10,975.92
	Deducted from Branchini, in error. (letter from Rockport)	1.75	July	Store Bill.	843.48
				Supplies, etc.	35.49
June	a/c Ex. charged in error	.45			11,854.89
		10,597.08			
Sep. 14	Ck.	843.48		Cr. 414.33	
		11,440.56			
Oct. 1	Tel. charges	3.05			

Ch'ge 30% on Store Bill & use Bldgs. etc. & other items which offset this a/c.

248 To which ruling of the Learned Court counsel for plaintiff in error duly excepted.

Sixty-second. That the said Court erred in over-ruling the objection of counsel for the plaintiff in error to the admission of a certain account book or board bill book of Frank P. Bartlett, at the Sachems Head Quarry, from March, 1903, to November, 1903, and which book was marked Plaintiff's Exhibit A, "R. E. G.", and is attached to the commission of Alexander Toffi, taken in Boston, on the 30th day of March, 1910. The full substance of the evidence admitted being the proof of the detailed account of the supplies furnished to the laborers by the defendant in error, Frank P. Bartlett.

Over the objection of counsel for plaintiff in error that the said book was incompetent, irrelevant and immaterial and as not having been sufficiently proven and not a book of original entry or a copy thereof, and after exception by counsel for plaintiff in error the said book was admitted in evidence.

Sixty-third. That the said Court erred in denying the motion of counsel for plaintiff in error made at the close of the plaintiff's case for a dismissal of the complaint, to which ruling of the Learned Court the counsel for plaintiff in error duly excepted.

Sixty-fourth. That the said Court erred in admitting evidence on the part of the defendant in error United States for the benefit of Frank P. Bartlett, upon the trial, and in overruling the objection of counsel for plaintiff in error to the following question put by counsel for defendant in error to the witness Anson M. Bangs:

249 "Q. Mr. Bangs, the second contract was dated some time in October, 1905. Did you, under the Act of Congress of August 13, 1894, which was amended in February, 1905.

In answer to which question said witness was permitted to testify, after exception by counsel for plaintiff in error, as follows:

"A. I don't know as I do. I may have known about it, but not that I recall now."

Sixty-fifth. That the said Court erred in excluding evidence offered by plaintiff in error upon the trial, upon the objection of the counsel for defendant in error Frank P. Bartlett, and erred in sustaining the objection of counsel for defendant in error, Frank P. Bartlett, to the following question put to the witness Anson M. Bangs by counsel for plaintiff in error:

"Q. Just one question I forgot, Mr. Bangs, do you remember any statement to Mr. Donovan, at any time, concerning whether this account had been paid in full?"

Sixty-sixth. That the said Court erred in denying the motion of counsel for plaintiff in error made at the close of the case, for the direction of a verdict in favor of the defendant, to which ruling of the court counsel for plaintiff in error duly excepted.

Sixty-seventh. That the said Court erred in the ruling that the counsel for the defendant in error, Frank P. Bartlett, was entitled to look at and use the cards from the card ledgers that were offered in evidence by the counsel for plaintiff in error, and which

250 was excluded on the objection of the counsel for defendant in error, Frank P. Bartlett, and to which ruling of the Learned Court counsel for plaintiff in error excepted and under protest, and in response to the Court's said ruling yielded to and permitted counsel for the defendant in error, Frank P. Bartlett, to look at the said cards.

Sixty-eighth. That the said Court erred in the following statement made by it in the course of the trial, in the presence and hearing of the Jury to counsel for plaintiff in error.

"Show him those cards, it is the order of the Court; show them those cards. Such tactics will surely react against your client."

To which language and statement of the Learned Court counsel for plaintiff in error duly excepted.

Sixty-ninth. That the said Court erred in the following statement made by it in the presence and hearing of the Jury, in the course of the trial, and to which statement of the Court counsel for plaintiff in error duly excepted. The statement being as follows:

"I do not consider the averments of laches made out. I mean by

laches, I include any action of the Surety Company upon the fact of the inaction of the contractor, and so I shall take that question from them."

Seventieth. That the said Court erred in the following statement made in the presence and hearing of the Jury at the conclu-
251 sion of the trial, and to which statement of the learned Court counsel for plaintiff in error duly excepted; the statement of the Court was made in answer to the following question of counsel for plaintiff in error addressed to the Court:

"So practically the only question, as I understand it, is as to the agreement that was made,"

to which the Court replied:

"As to the question as to whether the transaction took place as he testified; whether, as a matter of fact, the work was done and the question of the payments."

To which statement of the learned Court counsel for plaintiff in error duly excepted.

Seventy-first. That the said Court erred in declining and refusing, at the request of counsel for plaintiff in error, to make the following charge or statement to the Jury at the conclusion of the trial, and in refusing the request of counsel for plaintiff in error to charge the following:

"I ask your Honor to charge the Jury that a mere agreement on the part of the laborers to assign their wages in the future or after being earned is not sufficient to save an action."

To which ruling of the learned Court counsel for plaintiff in error duly excepted.

Seventy-second. That the said Court erred in declining and refusing, at the request of counsel for plaintiff in error, to make the following charge or statement to the Jury at the conclusion of
252 the trial, and in refusing the request of counsel for plaintiff in error to charge the following:

"I ask your Honor to charge that wages must have been earned before an assignment of such wages can be made."

To which ruling of the learned Court counsel for plaintiff in error duly excepted.

Seventy-third. That the said Court erred in the following charge or statement to the Jury at the conclusion of the trial:

"The laborers were at the quarry for the most part at Sachems Head, some fifty or sixty miles from the breakwater, and their work consisted of some various things; part of it was actually drilling and blasting of stone which was used in the breakwater, and part was incidental to that drilling and blasting, such as sharpening of the drills when they became rusty, repairs of the cars as things became broken. There was a small tramway and by that tramway stone was taken from the quarry down to the Sound where scows lay which carried the stones to Point Judith through the Sound to Watch Hill. Part of the work was the carpenter's in repairing the derricks if they became injured in the progress of the work, as was the case, I assume, on account of its heavy, rough character. In

any event, such labor was performed in keeping these derricks so that they could hoist the stone and in keeping the cars so that they could carry the stone, and in general making it possible to carry on the work. Now, all that work, all that labor, I charge
253 you was work done in the prosecution of the work, and it is work for which the laborers could themselves recover under this bond."

To which statement or charge of the learned Court counsel for plaintiff in error duly excepted.

Seventy-fourth. That the said Court erred in the following charge or statement to the Jury at the conclusion of the trial:

"Now, the first question as to the assignment of claims, is whether you believe that Bartlett who is an interested person, made an agreement with laborers such as he said he did, and if he said that to the laborers and if they went upon the work, that was an agreement on their part that he should take that course of conduct, and then subsequently if they went to his store and got supplies from him, and if when they got their pay envelopes, the amount of their supplies were deducted, that would be a further indication of their assent to the agreement."

To which statement or charge of the learned Court counsel for plaintiff in error duly excepted.

Seventy-fifth. That the said Court erred in the following charge or statement to the Jury at the conclusion of the trial:

"If you find that the business was carried on in that way, that they knew that Bartlett was to retain out of their wages the amount which he charged them for the stores which he supplied and which they were not getting, and which they understood that he
254 was getting, then you will find that that constituted an assignment of so much of their wages as was represented by the price of the supplies that he furnished them. That would be what the law calls an assignment pro tanto, an assignment of so much. Now, that is what Bartlett claims for here; and the amount of those supplies, that is, the amount of wages which he became entitled to in that way, are the amounts, he says, that he sent to Hughes Brothers & Bangs and that they checked over and agreed upon."

To which statement or charge of the learned Court counsel for plaintiff in error duly excepted.

Seventy-sixth. That the said Court erred in charging and stating to the Jury, at the conclusion of the trial, referring to the application of the payments, that it was for them, the Jury, to find what the fair and reasonable intent was in regard to their application as to the payment after October, 1905, and that if the Jury found from the intent of that conversation that there was such an understanding between the parties, they were at liberty to apply the payments after October, 1905, to the second contract. The said statement or charge being more specifically as follows:

"The question of fact is whether from those words a fair and reasonable intent is to be inferred that subsequent payments which were actually made the parties understood to be applicable to the money that Bartlett was earning after October, 1905, and if you

find that that was a fair inference to be drawn from what was said between them at that time, then you must credit those pay-
255 ments after October, 1905, to the second contract which took place. You will not credit it against the contract upon which Bartlett is now suing. If you find that, then the claim of Bartlett will be reduced only by the payment made between March, 1903, and October, 1905, and these cards will enable you to make that calculation."

To which statement or charge of the learned Court counsel for plaintiff in error duly excepted.

Seventy-seventh. That the said Court erred in the following charge or statement to the Jury at the conclusion of the trial.

"First is the statute of limitation. I charge you that is not a defense in this case."

To which statement or charge of the learned Court counsel for plaintiff in error duly excepted.

Seventy-eighth. That the said Court erred in the following charge or statement to the Jury at the conclusion of the trial:

"And the second is, that Bartlett, by his long delay, followed as it was by the insolvency, not only of Hughes Brothers & Bangs, but of the several companies which they organized to carry on this business, so prejudiced the Surety Company, the defendant here, as made it inequitable for him to recover. As to that, I charge you that there is no evidence in the case that Bartlett knew that through his delay in prosecuting his claim, Hughes
256 Brothers & Bangs and their companies would become insolvent. There is no evidence in the case that he had any reason to suspect that through his delay the position of the surety would be imperiled, and therefore the case rests simply upon the fact that he did delay, that he did thereby take the risk and so compelled the surety to take the risk of a continued solvency of Hughes Brothers & Bangs and their companies. That, I charge you, is not sufficient under the law to discharge the surety, so you may leave out of your consideration the two defenses that the defendants have pleaded."

To which statement or charge of the learned Court counsel for plaintiff in error duly excepted.

Seventy-ninth. That the said Court erred in declining and refusing to make the following statement or charge to the Jury at the request of counsel for plaintiff in error:

"And it is for the jury to find under the circumstances and the evidence in the case as to whether any of those moneys after October 26th were received and paid out of the moneys, received from and paid by the United States Government on the second contract of October, 1905."

To which refusal of the learned Court so to charge, counsel for plaintiff in error duly excepted.

Eightieth. That the said Court erred in declining and refusing and denying the motion of counsel for plaintiff in error,
257 made at the close of the case, and after the rendition of the verdict, by reason of the exceptions taken on the trial and

because the said verdict was against the weight of evidence to set aside the said verdict to the denial of which motion by the learned Court, counsel for plaintiff in error duly excepted.

Wherefore, the said United States Fidelity and Guaranty Company, plaintiff in error herein, prays that the judgment entered in this case in the office of the Clerk of the United States Circuit Court for the Southern District of New York, Second Circuit, on the 15th day of June, 1910, in favor of the United States for the benefit of Frank P. Bartlett and against the plaintiff in error, United States Fidelity and Guaranty Company in the sum of Two thousand eight hundred and thirty-four and 79/100 (2,834.79) dollars found by the Jury, together with the sum of One hundred and twenty-six and 10/100 (126.10) dollars, costs of this action as taxed, in all amounting to the sum of Two thousand, nine hundred and sixty and 89/100 (2,960.89) dollars damages and costs, be reversed, and that the said Circuit Court be directed to grant a new trial of said cause, and for such other and further and different relief as to the Court may seem just and proper.

Dated New York, July 6, 1910.

SUMNER BOWMAN,
Attorney for Plaintiff in Error, United States Fidelity & Guaranty Co.

EMANUEL J. MYERS,
Counsel.

(Endorsed:) U. S. Circuit Court, Southern District N. Y.—Filed Jul- 11, 1910.—John A. Shields, Clerk.

258 *Bond on Appeal.*

United States Circuit Court, Southern District of New York.

UNITED STATES for Benefit of FRANK P. BARTLETT, Complainant,
against
UNITED STATES FIDELITY AND GUARANTY COMPANY and JOHN F. DONOVAN, Defendant.

Know all men by these presents, That the Title Guaranty & Surety Company having an office and principal place of business at No. 84 William Street, in the City of New York, County and State of New York, is held and firmly bound unto the above named United States for benefit of Frank P. Bartlett, in the sum of Thirty-five hundred seventy dollars ($3,570.00), to be paid to the said United States for benefit of Frank P. Bartlett, for the payment of which well and truly to be made, it binds itself, its successors and assigns, jointly and severally, firmly by these presents. Sealed with its seal, and dated the 24th day of June, in the year of our Lord one thousand nine hundred and ten.

Whereas, the above named United States Fidelity and Guaranty Company has prosecuted its appeal to the United States Cir-
259 cuit Court of Appeals for the Second Circuit, to reverse the judgment rendered in the above entitled suit, by the Judge

of the Circuit Court of the United States for the Southern District of New York.

Now, therefore, the condition of this obligation is such, that if the above named United States Fidelity and Guaranty Company, shall prosecute its appeal to effect, and it fails to make its plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

THE TITLE GUARANTY & SURETY COMPANY.

[SEAL.] By FRED C. WILLIAMS.

Attest:

GEO. W. YUENGLING.

STATE, CITY AND COUNTY OF NEW YORK, *ss:*

On June 25, 1910, before me personally appeared Fred C. Williams, to me known, who being by me duly sworn, did depose and say: that he resided in the City of New York; that he is the Attorney-in-fact of The Title Guaranty & Surety Company, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said corporation do not exceed its assets, as ascertained in the manner provided by Section 3, Chapter 720, of the New York Session Laws of 1893.

And the said Fred C. Williams further said that he was acquainted with Geo. W. Yuengling, and knew him to be the Resident
260 Secretary of said corporation; that the signature of said Geo. W. Yuengling subscribed to the said instrument is in the genuine handwriting of said Geo. W. Yuengling, and was thereto subscribed by like order of said Board of Directors and in the presence of him, the said Fred C. Williams, Attorney-in-fact.

W. W. ALLEN,

Commissioner of Deeds, the City of New York.

At a meeting of the Executive Committee of The Title Guaranty & Surety Company, Scranton, Penna., held at the office of the Company, on the 15th day of January, A. D. 1910, the following resolution was adopted:

Resolved, that this Company do and it hereby does authorize and empower Fred C. Williams, as Attorney-in-Fact, attested by Geo. W. Yuengling, Resident Secretary, or Ross M. Stone, Resident Assistant Secretary; or Geo. W. Yuengling, Attorney-in-Fact, attested by Ross M. Stone, Resident Assistant Secretary, to execute, deliver and attach the seal of the Company to any and all bonds, recognizances or contracts of indemnity, and all instruments of reinsurance, and all other writings, obligatory in the nature thereof, and all contracts guaranteeing the fidelity of persons holding places of public or private trust, guaranteeing the performance of contracts and executing and guaranteeing bonds or undertakings required or permitted in all actions or proceedings or by law allowed.

261 STATE, CITY AND COUNTY OF NEW YORK, *ss:*

I, Geo. W. Yuengling, Resident Secretary of The Title Guaranty & Surety Company, have compared the foregoing resolution with the original thereof, as recorded in the Minute Book of said Company, and do hereby certify that the same is a correct and true transcript therefrom, and of the whole of said original resolution. Given under my hand and the seal of the Company at the City of New York, on June 25, 1910.

GEO. W. YUENGLING, [SEAL.]
Resident Secretary.

Statement of Condition of the Title Guaranty & Surety Company at the Close of Business December 31, 1909.

Resources.

Cash on Hand and in Banks	$151,361.16
Demand Collateral Notes	65,425.00
Bonds	1,605,773.62
Mortgages	111,759.89
Real Estate	97,160.36
Premiums in Course of Collection, Net	145,481.33
Bills Receivable and Advances on Contracts	99,492.89
Accrued Interest	11,372.70
	$2,287,826.95

262 Liabilities.

Premium Reserve		$387,398.73
Reserve for Claims		367,251.63
Reserve for Taxes and Accounts Payable		15,897.90
Capital Stock	$1,000,000.00	
Surplus as regards bondholders	$1,517,278.69	
Surplus as regards bondholders	$1,517,278.69	
		$2,287,826.95

STATE, CITY AND COUNTY OF NEW YORK, *ss:*

Geo. W. Yuengling, being duly sworn, says that he is the Resident Secretary of The Title Guaranty & Surety Company, and that the foregoing is a correct statement of the financial condition of the Company on December 31, 1909, to the best of his knowledge and belief, and that the financial condition of said Company is as favorable now as it was when such statement was made.

GEO. W. YUENGLING,
Resident Secretary.

Sworn to and subscribed before me on June 25, 1910.

[SEAL.] W. W. ALLEN,
Commissioner of Deeds, the City of New York.

Approved as to form and also as to sufficiency of sureties, with reservation, however, to the defendants of the right at any time to examine the proper officers of the Surety Company, under
263 oath, touching its assets, liabilities and financial condition generally.

E. H. LACOMBE,
U. S. Circuit Judge.

(Endorsed:) U. S. Circuit Court, Southern District, N. Y.—Filed July 13, 1910—John A. Shields, Clerk.

By The Honorable S. Henry Lacombe, one of the Judges of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit, to the United States of America for the benefit of Frank P. Bartlett and John F. Donovan, defendants in error, Greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan in the City of New York, in the District and Circuit above named, on the 10th day of August, 1910, pursuant to a Writ of Error filed in the Clerk's office of the Circuit Court of the United States for the Southern District of New York, wherein the United States Fidelity & Guaranty Co. is the plaintiff in error and the United States of America for the benefit of Frank P. Bartlett and John F. Donovan are defendants in error, and you are to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said Writ of Error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the
264 City of New York, in the District and Circuit above named, this 13th day of July, in the year of our Lord One Thousand Nine Hundred and Ten, and of the Independence of the United States the One Hundred and Thirty-fifth.

E. H. LACOMBE,
Judge of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

(Endorsed:) United States Circuit Court of Appeals for the Second Circuit—United States Fidelity & Guaranty Co., Plaintiff in Error (Defendant below), vs. United States for the benefit of Frank P. Bartlett and John F. Donovan, Defendants in Error—(Orig. Citation)—Summer Bowman, Attorney for defendant U. S. Fidelity & Guaranty Co., 66 Liberty Street, New York City—Service of a copy of the within Citation is hereby admitted this 13th day of July, 1910—Edward W. Norris, Attorney for Defendant in Error.—(Stamped:) U. S. Circuit Court, Southern District, N. Y.—Filed Jul- 13, 1910.—John A. Shields, Clerk.

265 *Petition for Cross-writ of Error.*

United States Circuit Court, Southern District of New York.

UNITED STATES for the Benefit of FRANK P. BARTLETT, Plaintiff,
against
THE UNITED STATES FIDELITY & GUARANTY COMPANY and JOHN F. DONOVAN, Defendants.

And now comes the plaintiff, the United States for the benefit of Frank P. Bartlett, herein by Edward W. Norris, his Attorney, and says, that on or about the 15th day of June, 1910, this Court entered judgment herein in favor of the plaintiff and against this defendant for $2,960.89, in which judgment and proceedings had prior thereunto in this cause certain errors were committed to the prejudice of this plaintiff and whereby this plaintiff feels itself aggrieved, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays this Court for an order allowing said plaintiff to prosecute his Cross Writ of Error in his behalf to the United States Circuit Court of Appeals, for the Second
266 Circuit, for the correction of the errors so complained of in accordance to law and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

And your petitioner will ever pray.

EDWARD W. NORRIS,
Attorney for Plaintiff United States for the Benefit of Frank P. Bartlett.

Dated New York, August 20th, 1910.

(Endorsed:) U. S. Circuit Court, Southern District N. Y.—Filed Sep. 14, 1910—John A. Shields, Clerk.

267 *Order Allowing Cross-writ of Error.*

At a Term of the United States Circuit Court for the Southern District of New York, Second Circuit, held at the Post Office Building, in said District, in the Borough of Manhattan, on the 13th day of Sept., 1910.

Present: Honorable E. H. Lacombe, Judge of the U. S. Circuit Court.

UNITED STATES for the Benefit of FRANK P. BARTLETT, Plaintiff,
against
THE UNITED STATES FIDELITY & GUARANTY COMPANY and JOHN F. DONOVAN, Defendants.

This 12th day of August, 1910, came the plaintiff, the United States for the benefit of Frank P. Bartlett, by his Attorney, Edward

W. Norris, Esq., and filed herein and presented to the Court his petition praying for the allowance of a Cross Writ of Error and assignment of errors intended to be urged by it, praying also that a transcript of the records and proceedings, and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Second Judicial Circuit, that such other and further proceedings may be had as may be proper in the premises.

268 On consideration whereof it is ordered that a Cross Writ of Error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Second Circuit the judgment heretofore entered herein on the 15th day of June, 1910, and the proceedings had prior thereunto.

E. H. LACOMBE,
U. S. C. J.

(Endorsed:) U. S. Circuit Court, Southern District N. Y.—Filed Sept. 14, 1910—John A. Shields, Clerk.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judges of the Circuit Court of the United States for the Southern District of New York, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the Circuit Court, before you, or some of you, between the United States for the benefit of Frank P. Bartlett, plaintiff, against The United States Fidelity & Guaranty Company and John F. Donovan, defendants, a manifest error hath happened, to the great damage of the said United States, for the benefit of Frank P. Bartlett, as is said and appears by his complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Judges of the United States Circuit Court of Appeals for

269 the Second Circuit, at the City of New York, together with this writ, so that you have the same at the said place, before the Judges aforesaid, on the 11th day of October, 1910, that the record and proceedings aforesaid being inspected, the said Judges of the United States Circuit Court of Appeals for the Second Circuit, may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable John M. Harlan, Associate Justice of the Supreme Court of the United States, this 13th day of September in the year of our Lord one thousand nine hundred and ten and of the Independence of the United States the one hundred and thirty —.

[SEAL.] JOHN A. SHIELDS,

The foregoing writ is hereby allowed.

E. HENRY LACOMBE,
U. S. Circuit Judge.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, by virtue of the foregoing Writ of Error, and in obedience thereto, do hereby certify, that the pages numbered from 257 to 271 inclusive, contain a true and complete transcript of the cross writ of error and proceedings had in said Court in the cause of United States for the benefit of Frank P. Bartlett, plaintiff in error, against The United States Fidelity & Guaranty Company and John
270 F. Donovan, defendants in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 22nd day of December, in the year of our Lord one thousand nine hundred and ten, and of the Independence of the United States the one hundred and thirty-fifth.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

(Endorsed:) The U. S. Circuit Court of Appeals for the Second Circuit—United States for the Benefit of Frank P. Bartlett, Plaintiff in Error (Plaintiff Below), vs. The United States Fidelity & Guaranty Company and John F. Donovan, Defendant- in Error (Defendant- Below)— Orig. Writ of Error—Edward W. Norris, Attorney for Plaintiff in Error, 12 Broadway New York City—Service of a Copy of the Within Writ of Error is Hereby Admitted this 15th day of September, 1910— Sumner Bowman, Attorney for Defendant- in Error. U. S. Circuit Court, Southern District—Filed Sep. 16, 1910—John A. Shields, Clerk.

271 *Assignment of Errors.*

United States Circuit Court, Southern District of New York.

UNITED STATES for the Benefit of FRANK P. BARTLETT, Plaintiff,
against
THE UNITED STATES FIDELITY & GUARANTY COMPANY and JOHN F. DONOVAN, Defendants.

Assignment of Errors of the United States for the Benefit of Frank P. Bartlett.

And now comes the United States, for the benefit of Frank P. Bartlett, the plaintiff (below) in the above entitled action, by his Attorney, Edward W. Norris, and presents the following Assign-

ment of Errors which he avers occurred upon the trial of this cause, and says:

That the United States Circuit Court for the Southern District of New York erred in granting the motion of the defendant (below) the United States Fidelity & Guaranty Company upon the trial herein in setting aside the verdict of the jury so far as it awarded interest upon the principal amount found due and in signing the order of June 16th, 1910 setting aside the verdict so far as it awarded interest to the plaintiff (below). The Order is as follows:

272 "At a Stated Term of the Circuit Court of the United States for the Southern District of New York, held in the Post Office Building, Borough of Manhattan, City of New York, on the 16th day of June, 1910.

Present: Hon. Leonard Hand, Justice.

UNITED STATES for the Benefit of FRANK P. BARTLETT, Plaintiff,
against
THE UNITED STATES FIDELITY & GUARANTY COMPANY and JOHN F. DONOVAN, Defendants.

The defendant, The United States Fidelity & Guaranty Company, having moved at the conclusion of the trial in the above entitled action, and after the verdict of the jury to set aside the verdict in so far as interest was allowed by the jury upon the principal amount of plaintiff's claim as found, and the plaintiff, by his counsel, having moved the Court to deny said motion, and due deliberation being had thereon, it is, upon motion of the attorney for the defendant, The United States Fidelity & Guaranty Company,

Ordered, that the verdict be set aside and disallowed, in so
273 far as it awards interest to the plaintiff, and that the plaintiff have an exception to this ruling.

LEARNED HAND, *J. C. C.*"

to which counsel for plaintiff (below) duly excepted.

Wherefore, the said United States, for the benefit of Frank P. Bartlett, the plaintiff (below) prays that the judgment entered in this case in the office of the Clerk of the United States Circuit Court for the Southern District of New York on the 15th day of June, 1910, against the said The United States Fidelity & Guaranty Company and John F. Donovan in the sum of $2,960.89 be modified so that it should include interest from December 1st, 1903, to date and for such other and further relief as may be just.

Dated, New York, August 20th, 1910.

EDWARD W. NORRIS,
Attorney for the United States for the Benefit of Frank P. Bartlett.

Office and P. O. Address, 42 Broadway, New York City, Borough of Manhattan.

(Endorsed:) U. S. Circuit Court, Southern District N. Y.—Filed Sep. 14, 1910.—John A. Shields, Clerk.

274 *Undertaking on Writ of Error.*

United States Circuit Court, Southern District of New York.

UNITED STATES for the Benefit of FRANK P. BARTLETT, Plaintiff,
against
THE UNITED STATES FIDELITY & GUARANTY COMPANY and JOHN F. DONOVAN, Defendants.

Know all men by these presents, That I, Louis Peirano, residing at 32 Mulberry Street, Borough of Manhattan, City of New York, *is* held and firmly bound unto the United States Fidelity & Guaranty Company and John F. Donovan, in the sum of two hundred and fifty dollars, to be paid to the said The United States Fidelity & Guaranty Company, its successors and assigns, and John F. Donovan, his heirs, executors, administrators or assigns, for the payment of which well and truly to be made, I bind myself, my heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with my seal and dated the 30th day of August, 1910.

Whereas, the above named United States for the benefit of Frank P. Bartlett has prosecuted a Writ of Error to the United States
275 Circuit Court of Appeals for the Second Circuit, from a judgment of the United States Circuit Court, Southern District of New York, bearing date the 15th day of June, 1910, in a suit wherein United States for the benefit of Frank P. Bartlett is plaintiff *against* the United States Fidelity & Guaranty Company and John F. Donovan are defendants.

Now, therefore, the condition of this obligation is such that if the above named United States for the benefit of Frank P. Bartlett shall prosecute said Writ of Error with effect, and pay all costs which may be awarded against him if the Writ of Error is not sustained, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

LOUIS PEIRANO.

STATE OF NEW YORK,
County of New York, ss:

Louis Peirano, being duly sworn says, that he is a resident and householder within the Southern District of New York, and worth the sum specified in the above undertaking, to wit, Two hundred and Fifty Dollars, over all the debts and liabilities which he owes or has incurred, and exclusive of property exempt by law from levy and sale under an execution.

LOUIS PEIRANO.

Sworn to before me this 30th day of August, 1910.
[SEAL.] JOSEPH W. GUIDE,
Notary Public, Kings Co.

Cert. filed in N. Y. Co.

276 STATE OF NEW YORK,
County of New York, ss:

I certify that on this 30th day of August, 1910, before me personally appeared the above named Louis Peirano, to me known and known to me to be the individual described in, and who executed the above undertaking, and he duly acknowledged to me that he executed the same.

[SEAL.] JOSEPH W. GUIDE,
Notary Public, Kings Co., No. 2115.

Cert. Filed in N. Y. Co.

(Endorsed.)

The within undertaking is hereby approved as to manner, form and amount, and as to the sufficiency of the surety therein named.
Dated, New York, August 31st, 1910.

E. H. LACOMBE,
Judge of the U. S. Circuit Court.

(Endorsed:) U. S. Circuit Court, Southern District N. Y.—Filed Sept. 14, 1910—John A. Shields, Clerk.

277 By the Honorable E. Henry Lacombe, one of the Judges of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

To the United States Fidelity & Guaranty Company and John F. Donovan, Defendants in Error, Greeting:

You are hereby cited and admonished to be and appear before a United States Circuit Court of Appeals for the Second Circuit, to be holden at the Borough of Manhattan in the City of New York, in the District and Circuit above named, on the 11th day of October, 1910, pursuant to a Writ of Error filed in the Clerk's Office of the Circuit Court of the United States for the Southern District of New York, wherein the United States for the benefit of Frank P. Bartlett is the plaintiff in error and The United States Fidelity & Guaranty Company and John F. Donovan, the defendants in error, and you are to show cause, if any there be, why the judgment rendered against the said defendants in error as in said Writ of Error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan, in the City of New York, in the District and Circuit above named, this 13th day of September, in the year of our Lord One Thousand Nine Hundred and Ten, and of the Independence of the United States the One Hundred and Thirty-fourth.

E. H. LACOMBE,
Judge of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

278 (Endorsed:) United States Circuit Court of Appeals—for the Second Circuit—United States for the benefit of Frank P. Bartlett, Plaintiff in Error (Plaintiff Below) vs. The United States Fidelity & Guaranty Company and John F. Donovan, Defendants in Error (Defendants below)—(Orig. Citation)—Edward W. Norris, Attorney for Plaintiff in Error, 42 Broadway, New York City—Copy received Sept. 15th, 1910—Sumner Bowman, Attorney for Defendant in Error. United States Circuit Court, Southern District, N. Y.—Filed Sept. 16, 1910.—John A. Shields, Clerk.

279 United States Circuit Court of Appeals, Second Circuit.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY, Plaintiff in Error (Defendant Below),
against
UNITED STATES for the Benefit of FRANK P. BARTLETT, Defendant in Error (Plaintiff Below).

SIR: Please take notice, that upon the Transcript of Record, and the affidavits of Edward W. Norris and Frank P. Bartlett, verified March 2, 1911, a motion will be made at the United States Circuit Court of Appeals, for the Second Circuit, to be held at the Post Office Building, in the City of New York, Borough of Manhattan, on March 6, 1911 at 10:30 A. M., or as soon thereafter as counsel can be heard, to dismiss the Writ of Error on the ground that the judgment being a joint one the co-defendant John F. Donovan in the Court below should have joined in the Writ of Error, and if said motion is granted, that leave be given by this Court to United States for the benefit of Frank P. Bartlett to withdraw his Writ of Error to review the judgment in the case of United States for the benefit of Frank P. Bartlett, Plaintiff in Error (plaintiff below),
against The United States Fidelity and Guaranty Company,
280 Defendant in Error (Defendant below), and for such other and further relief as may be consistent with the rules and practice of this Court.

Dated, New York, March 2, 1911.

Yours, etc.,

EDWARD W. NORRIS,
Attorney for United States for the Benefit of Frank P. Bartlett.

To Sumner Bowman, Esq., Attorney for The United States Fidelity and Guaranty Company.

281 United States Circuit Court of Appeals, Second Circuit.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY, Plaintiff in Error (Defendant Below),
against
UNITED STATES for the Benefit of FRANK P. BARTLETT, Defendant in Error (Plaintiff Below).

STATE OF NEW YORK,
County of New York, ss:

Edward W. Norris, being duly sworn, says: he is the attorney for United States for the benefit of Frank P. Bartlett, the Defendant in Error in the above entitled action; and also the attorney for said Frank P. Bartlett, Plaintiff in Error in the Writ of Error sued out by him against The United States Fidelity and Guaranty Company; there being but one Bill of Exceptions for both Writs of Error.

That the judgment sought to be reviewed was recovered in the United States Circuit Court, Southern District of New York, in the case of United States for the benefit of Frank P. Bartlett, against The United States Fidelity and Guaranty Company and John F. Donovan, Defendants. The said Frank P. Bartlett entered judgment against the United States Fidelity and Guaranty Company and John F. Donovan for the sum of $2,960.89. That thereafter an Order was made on behalf of the United States Fidelity & Guaranty Co. directing the Clerk to enter in his docket, judgment against both defendants: nunc pro tunc as of June 15th, 1910.

That on the 13th day of July, 1910, a petition for Writ
282 of Error was filed signed as follows: "Sumner Bowman, Attorney for Defendant, United States Fidelity & Guaranty Co." together with its Assignments of Errors to review the aforesaid judgment and for an order fixing the amount of security which defendant should give; that on the same day the order, allowing the Writ of Error of the United States Fidelity & Guaranty Co. upon it filing bond for $3,570, which bond was filed same day. The Writ of Error and Citation was granted on same day. All these papers bear the signature of "Sumner Bowman, Attorney for United States Fidelity & Guaranty Co." That the said judgment was a joint judgment against the United States Fidelity & Guaranty Co. and John F. Donovan; the action having been brought to recover on a bond for labor supplied in the prosecution of the breakwater construction, Harbor of Refuge, at Point Judith, R. I. for the United States. The said Donovan being the principal and the United States Fidelity & Guaranty the surety on the bond sued on, in compliance with the Act of Congress, approved August 13th, 1894. That the said John F. Donovan has not joined in the United States Fidelity & Guaranty Company's petition for a Writ of Error, nor has he filed any assignments of error, or had any Writ of Error or Citation granted, nor filed a bond, and no request was made by the United States Fidelity & Guaranty to the said Donovan, so deponent has been informed by

it to have him joined; furthermore, there has been no summons and severance to entitle the plaintiff in error, United States Fidelity & Guaranty Co. to proceed alone.

That the plaintiff in error, United States Fidelity & Guaranty Co. did not procure any order permitting it to sue out the Writ of Error without joining John F. Donovan; although it procured an order of the Court below directing the Clerk to enter judgment against the said John F. Donovan; that the Petition for Writ of Error, Order allowing Writ of Error, or the Writ of Error of the United States
Fidelity & Guaranty Company, contains no allegation that
283 the said John F. Donovan refused to become a plaintiff in Error; furthermore the record shows that no summons was served on him directing him to sue out a Writ of Error, and further that no judgment of severance has been ordered by this Court or the Court below.

That at the trial in the Court below, the jury brought in a verdict for the plaintiff in the sum of $2,825.37 with interest, and the defendant, United States Fidelity & Guaranty Company, objected to the allowance of interest and moved the Court that the interest be disallowed; the Court took same under advisement, and June 16th, 1910, by an order made set the verdict aside in so far as it awarded interest to the plaintiff, allowing the plaintiff an exception.

That on the 13th day of September, 1910, the plaintiff below, United States for the benefit of Frank P. Bartlett, filed a petition for Writ of Error together with his Assignments of Error, and had an order allowing the Writ of Error signed; he filed his bond and a Writ of Error and Citation was allowed the same day; the plaintiff below agreeing that *that* it would not be necessary to file a separate Bill of Exceptions.

Wherefore, deponent prays that the Writ of Error be dismissed with costs, and that United States for the benefit of Frank P. Bartlett, plaintiff in Error, (Plaintiff below) may have leave to withdraw his Writ of Error in this Court without costs.

EDWARD W. NORRIS.

Sworn to before me this 2nd day of March, 1911.

[Seal Stanley Holcomb Molleson, Notary Public, New York County.]

STANLEY HOLCOMB MOLLESON,
Notary Public, New York County.

284 United States Circuit Court of Appeals, Second Circuit.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY, Plaintiff in Error (Defendant Below),
against
UNITED STATES for the Benefit of FRANK P. BARTLETT, Defendant in Error (Plaintiff Below).

STATE OF NEW YORK,
County of New York, ss:

Frank P. Bartlett being duly sworn, says: he is the Defendant in Error in the above entitled case; that he has read the affidavit of Edward W. Norris, hereto annexed and that the same is in all respects true, and prays that the Writ of Error sued out by the United States Fidelity & Guaranty Company be dismissed with costs.

Deponent prays that if said Writ of Error is dismissed, permission is asked of this Honorable Court for United States for the benefit of Frank P. Bartlett, (deponent herein) who also sued out a Writ of Error in the case of United States for the benefit of Frank P. Bartlett, against United States Fidelity & Guaranty Company and John F. Donovan to withdraw said Writ of Error. There was but one Bill of Exceptions printed for both Writs of Error in the above case.

FRANK P. BARTLETT.

Sworn to before me this 2nd day of March, 1911.
[SEAL.]
WARREN McCONIHE,
Notary Public., New York County.

285 (Endorsed:) 4150. U. S. Circuit Court of Appeals, Second Circuit. The United States Fidelity and Guaranty Company, Plaintiff in Error, against United States for the benefit of Frank P. Bartlett, Defendant in Error. Affidavit and Notice of Motion. Edward W. Norris, Attorney for Dft in Error, 42 Broadway, New York City, Borough of Manhattan. Copy received March 2, 1911. Sumner Bowman, Attorney for Plaintiff in Error. United States Fidelity & Guaranty Co. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 6, 1911. William Parkin, Clerk.

286 United States Circuit Court of Appeals, Second Circuit.

UNITED STATES FIDELITY AND GUARANTY COMPANY, Plaintiff in Error (Defendant Below),
against
UNITED STATES for the Benefit of FRANK P. BARTLETT, Defendant in Error (Plaintiff Below) and John F. Donovan (Defendant Below).

STATE OF NEW YORK,
County of New York, ss:

Emanuel J. Myers, being duly sworn, deposes and says:

I. I am counsel for the defendant, United States Fidelity and Guaranty Company, and tried this action as hereinafter stated. Mr. Sumner Bowman of No. 66 Liberty Street, New York City, was and is the attorney of record for the defendant.

II. The action was brought by Frank P. Bartlett against the defendant above named in this Court, the summons being dated the 25th day of May, 1909, to recover the sum of $7,171.28, with interest thereon from the 1st day of December, 1908, for work, labor and services of the laborers employed in and about the construction of a Breakwater at Point Judith Harbor of Refuge, Rhode Island.

III. That the cause of action was founded on the bond given by the defendant, John F. Donovan as Principal, and the de-
287 fendant, United States Fidelity and Guaranty Company as Surety, for the performance of the contract between the United States and John F. Donovan for the performance of said work.

IV. The defendant, John F. Donovan, was not summoned in this action nor did he appear and interprose any answer in person or by attorney.

The defendant, Surety Company, interposed an answer, and upon the issues raised thereby the cause was tried before the Honorable Learned Hand, Justice, on May 24, 1910, and several days subsequent thereto, and a verdict rendered in favor of the plaintiff and against the defendant for the sum of $2,825.37, and the learned Trial Court refused to allow any interest on the verdict.

Upon the trial the defendant, John F. Donovan, was called as a witness in behalf of the plaintiff and testified as such witness in plaintiff's behalf, and was in attendance for several days and in no other respect was he in any wise a party to the proceedings.

The minutes of the trial show that it was moved by the plaintiff without service of the summons on the defendant, John F. Donovan.

V. The judgment upon the verdict, a copy of which is herewith submitted, was entered on the 15th day of June, 1910, and while the form of the judgment reads against both of the defendants, the United States Fidelity and Guaranty Company and John F. Donovan, the statement is made by the Clerk of this Court at the foot of the judgment, that "John F. Donovan had not been summoned," and the judgment was therefore docketed and entered only against

the defendant, the United States Fidelity and Guaranty Company.

288 VI. The said John F. Donovan is intimately connected with the plaintiff's attorney, Edward W. Norris, and occupies part of the same offices of the said attorney, so that he could have been easily summoned and the judgment properly entered against him.

VII. That the plaintiff is the assignee of wages alleged to be due and owing to laborers for work, labor and services rendered between the 1st day of March, 1903, and December, 1903, and the action was not brought until over six years after the work had been performed, and over five years after the work had been completed, without any claim of any kind being interposed against the Surety Company, or any notice of any kind of any default served upon the Surety Company, and deponent verily believes, after having tried the cause, that without the testimony of the said John F. Donovan the plaintiff could not have succeeded in this action.

VIII. The petition for the writ of error was filed herein on July 13, 1910, with the utmost promptness and diligence on the part of the defendant Surety Company to have the judgment and the proceedings upon the trial reviewed in this Court.

IX. The defendant Surety Company and the defendant John F. Donovan are named in the caption and title of the action in the writ of error, and are likewise named in the captain of the action stated in the order entered on the 13th day of July, 1910, allowing the writ of error, and at that time the records of this Court showed that the said John F. Donovan was in no wise a party to the said proceeding and had not been summoned nor had he appeared in this action.

289 X. The bond of the defendant Surety Company in the sum of $3,570.00 was fixed, allowed and filed on the 13th day of July, 1910.

The defendant Surety Company has in good faith proceeded with the utmost diligence, caused the record herein to be printed and has paid all the sums and fees for the printing thereof to the Clerk of this Court, and in every wise has complied with all the rules and regulations of this Court to have the writ of error promptly heard and presented to this Court.

XI. The liability on the bond is joint and several and upon that theory the action was tried and proceeded to judgment and inasmuch as the defendant John F. Donovan was neither summoned nor appeared he is not a party who could obtain a writ of error from the judgment herein, or have the judgment reviewed.

There was no way therefore that the defendant Surety Company could apply to John F. Donovan to join in the writ of error, or that he could make himself a party to the writ of error to have the judgment reviewed, or that the Surety Company could state correctly that he refused to join in, because the said John F. Donovan had appeared as a witness on the trial and testified to the facts upon which the judgment was rendered against the Surety Company.

XII. If, however, deponent is in error, and the Court deems it

proper that the said John F. Donovan should be a party to the record, the defendant Surety Company prays that it may have leave to take proper proceedings to make him a party to the writ of error in this Court.

290 XIII. That if the said defendant, John F. Donovan, could by any possibility have the right to review the said judgment by writ of error or otherwise, that as the said judgment was entered in the Circuit Court on the 15th day of June, 1910, more than six months have elapsed and any right of the said John F. Donovan to have the judgment reviewed has expired.

E. J. MYERS.

Subscribed and sworn to before me this 4th day of March, 1911.
CHARLES L. BROOKHEIM.
Notary Public, Westchester County.

Certificate filed in New York County.

291 (Endorsed:) 4150. U. S. Circuit Court of Appeals, Second Circuit. United States for the benefit of Bartlett, Plaintiff, against United States Fidelity & Guaranty Co. and Donovan, Defendants. Affidavit in Opposition. Myers & Goldsmith, Counsel for U. S. F. & G. Co., Def., No. 115 Broadway, Borough of Manhattan, New York City. The record shows that Donovan was not served with summons and did not appear. Motion denied March 6, 1911. E. H. L. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 6, 1911. William Parkin, Clerk.

292 At a stated term of the United States Circuit Court of Appeals for the Second Circuit, held at the court rooms in the Post Office Building, City of New York, on the 16th day of March, 1911.

Present: Hon. E. Henry Lacombe, Hon. Alfred C. Coxe, Hon. Henry G. Ward, Circuit Judges.

UNITED STATES FIDELITY AND GUARANTY COMPANY, Plaintiff in Error,
vs.
UNITED STATES ex Rel. FRANK P. BARTLETT, Defendant in Error.

A motion having been made herein by counsel for the Defendant in Error to dismiss the writ of error; Upon consideration thereof it is Ordered that said motion be and hereby is denied.

E. H. L.

Endorsed: United States Circuit Court of Appeals, Second Circuit. U. S. F. & G. Co. v. U. S. ex rel. Bartlett. Order. United States Circuit Court of Appeals, Second Circuit. Filed Mar. 17, 1911. William Parkin, Clerk.

293 United States Circuit Court of Appeals for the Second Circuit, October Term, 1910.

No. 269.

THE UNITED STATES FIDELITY & GUARANTY COMPANY, Plaintiff in Error,

vs.

UNITED STATES ex Rel. FRANK P. BARTLETT, Defendant in Error.

THE UNITED STATES ex Rel. FRANK P. BARTLETT, Plaintiff in Error,

vs.

THE UNITED STATES FIDELITY & GUARANTY COMPANY and JOHN P. DONAVAN, Defendants in Error.

Argued April 19, 1911. Decided May 8, 1911.

In Error to the Circuit Court of the United States for the Southern District of New York.

Before Lacombe, Ward and Noyes, Circuit Judges.

Writ of error to review a judgment of the Circuit Court, Southern District of New York, in favor of the defendant in error which was the plaintiff below.* In the statement and opinion following
294 the parties will be designated as in the Circuit Court and although the United States is the nominal plaintiff the person for whose use and benefit the action was brought—Frank P. Bartlett—will be called the plaintiff.

The plaintiff sued John F. Donovan (who, however, was not summoned), as principal and the defendant as surety upon a contractor's bond given pursuant to the Act of August 13, 1894, to recover upon assigned claims of laborers for services rendered at a quarry in Sachems Head, Connecticut, in getting out stone to be used under a contract between said Donovan and the United States for constructing a rip-rap breakwater extending out from the shore of Point Judith, Rhode Island. The particular provision of the bond upon which the plaintiff based his right of recovery is as follows:

"Now, therefore, if the above bounden John F. Donovan * * * shall promptly make full payments to all persons supplying him labor or materials in the prosecution of the work provided for in the contract the above obligation shall be void and of no effect; otherwise to remain in full force and effect."

The following are among the facts which were not disputed upon the trial:

The contract was made in the name of said Donovan who, how-

*A cross writ of error was also taken by the plaintiff to review the judgment because it did not include interest, but such writ of error was abandoned upon the hearing in this Court and may be dismissed.

ever, did not own any plant and who made an arrangement with the firm of Hughes Brothers and Bangs—with whom he was connected—to do the work in his name.

The stone used in the performance of the contract was quarried at Sachems Head, Connecticut, and was thence taken by water to Point Judith, some fifty or sixty miles distant.

The plaintiff furnished supplies for the laborers at the quarry under an arrangement with Donovan that the amounts of their respective monthly accounts should be deducted from the payroll; and at the end of each month the accounts with such deductions were submitted to the men and were approved by them.

The laborers employed at the quarry engaged in the pursuits and operations necessary to the operation of a quarry including the loading of the stone on barges and scows.

295 When the scows were loaded they were towed to Point Judith and the stone was there dumped on the breakwater.

The principal contentions of the defendant upon this writ of error as stated in its brief are as follows:

(1) The terms of the bond do not warrant a recovery for the labor employed in operating the quarry because the contract provides only for the furnishing and placing of the stone in a breakwater fifty miles distant therefrom.

(2) No assignment of the men's wages was shown sufficient to sustain an action at law;

(3) The plaintiff's claim was fraudulent;

(4) The trial court erred in the rulings upon evidence.

NOYES, *Circuit Judge* (after making the foregoing statement):

The labor required in getting out the stone at the quarry and loading it for transportation was undoubtedly the principal element in "the work to be done" under the contract. Most of the stone was merely dumped upon the breakwater. The labor there was inconsiderable. If, then, the bond cover only labor at the breakwater, it affords no protection to the men who in reality contributed most to the work. And if the statute leave such laborers without protection, it discriminates against them in favor of material men, for there can be no question that a claim of a sub-contractor for stone (in which labor would be the principal element of cost) used in a public work, would come within its provisions.

In our opinion the statute should receive no such narrow construction. As said by the Supreme Court of the United States in Hill vs. American Surety Co., 200 U. S., 197, 204:

"Language could hardly be plainer to evidence the intention of Congress to protect those whose labor or material has contributed to the prosecution of the work."

296 We find nothing in the statute to support the contention made in this case that the bond given in accordance with its provisions covered only the labor performed at the breakwater itself. Had there been a quarry at the shore end of the breakwater and had the stone been wheeled out from such quarry in wheelbarrows and dumped, it could hardly be claimed that the laborers who got out

the stone or hauled it were not engaged in the prosecution of the work. And the fact that a quarry might be fifty miles instead of fifty yards away from the dumping place should make no difference. We think that the bond in question covered the labor which the contractor was obliged to furnish to fulfil his contract with the Government whether it was performed at the particular place where the stone was finally placed or elsewhere; that the quarrying of the stone, its transportation and dumping should be regarded as a continuous operation contributing in its entire progress to the prosecution of the work. We therefore hold that the instruction of the trial court that the labor at the quarry "was work done in the prosecution of the work" was correct and within the principle of the decisions in Hill vs. American Surety Co., supra, as well as in City Trust Co. vs. United States, 147 Fed., 155; Guaranty Etc. Co. vs. Puget Sound Engineering Works, 163 Fed., 168; American Surety Co. vs. Lawrenceville Cement Co., 110 Fed., 717.

The case of Munroe vs. Clark (Maine Sup. Ct., 1910), 77 Atl. Rep., 696, which the defendant cites and quotes from at length, is not in conflict with, but rather supports, the conclusions we have reached. In that case the court, in speaking of a state lien law, said:

"The distinction is clear. Where one engages to erect a building, or to do certain things in the erection of the building, as, for example, the carpenter work, or the painting, or the plumbing, or the granite work, his employés have liens for their labor in doing these things. And if, in connection with doing these things, he agrees to furnish, and does furnish, the materials, the result is the same. It is not necessary that all of the labor should actually be done on the structure itself. To illustrate: The doors and windows
297 may be made at the shop, the boards may be sawed and planed at the mill, or the iron work done at the blacksmith shop. These processes are all a part of the erection of the building. The work so done, in the contemplation of the statute, is done 'in the erection of a building.' (Webster vs. Real Estate Improvement Co., 140 Mass., 526.)

"But where one contracts to furnish completed articles for a building, and is to have no part in the erection of the building, his employés have no lien for their labor in preparing and completing the articles. Their labor is in no proper sense performed 'in the erection of the building.'"

In the present case the contractor was not merely to furnish the stone and to have no part in the erection of the breakwater. Like the builder whose laborers worked in shop or mill to get out the material and whose work in the contemplation of the state statute was done "in the erection of the building" this contractor was, under his contract, both to furnish the material and put it in place, and his laborers who worked to get out such material contributed to the "prosecution of the work" within the meaning of the federal statute.

The second contention of the defendant is that the plaintiff showed only an equitable, as distinguished from a legal, assignment of the laborers' wages. We think this contention without foundation. While the original agreement, made at the time the laborers were employed, may have amounted only to an agreemnt to assign, the

act of the laborers after the wages were earned in going over the accounts and in approving the deductions was sufficient, in connection with the original agreement, to amount to a legal assignment.

The third contention of the defendant is that the plaintiff's claim was a fraud in law because (1) he made an exaggerated and unreasonable demand; (2) his demand was "inextricably confounded" with items for which the surety was not liable, and (3) he was guilty of laches and delay.

With respect to these contentions it is sufficient to say that the defense of laches not amounting to that of the statute of limitations is not available in actions at law; that a person does not forfeit
298 what is due him by demanding more, and that it is not shown that the accounts were "inextricably confounded."

The remaining contentions relate to rulings upon the trial. The admission of the leading questions and the answers thereto was, however, within the discretion of the trial judge and the defendant was not prejudiced by the admission of the statements made by Hughes Brothers and Bangs.

The judgment of the Circuit Court is affirmed.

E. J. Myers, for the U. S. F. & G. Co.
H. L. Cheyney, for F. P. Bartlett.

299 At a Stated Term of the United States Circuit Court of Appeals in and for the Second Circuit, Held at the Court Rooms in the Post Office Building in the City of New York, on the 18th Day of May, one Thousand Nine Hundred and Eleven.

Present: Hon. E. Henry Lacombe, Hon. Henry G. Ward, Hon. Walter C. Noyes, Circuit Judges.

UNITED STATES FIDELITY & GUARANTY COMPANY, Plaintiff in Error,
vs.
UNITED STATES ex Rel. FRANK P. BARTLETT, Defendant in Error.

Error to the Circuit Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States, for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged and decreed that the judgment of said Circuit Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said Circuit Court in accordance with this decree.

E. H. L.

300 Endorsed: United States Circuit Court of Appeals, Second Circuit. U. S. F. & G. Co. vs. U. S. ex rel. Bartlett. Order for Mandate. United States Circuit Court of Appeals Second Circuit. Filed May 18, 1911. William Parkin, Clerk.

301 At a Stated Term of the United States Circuit Court of Appeals for the Second Circuit, Held at the Court Rooms in the Post Office Building, City of New York, on the 18th Day of May, 1911.

Present: Hon. E. Henry Lacombe, Hon. Henry G. Ward, Hon. Walter C. Noyes, Circuit Judges.

UNITED STATES ex Rel. FRANK P. BARTLETT, Plaintiff in Error,
vs.
UNITED STATES FIDELITY & GUARANTY COMPANY and JOHN P. DONOVAN, Defendants in Error.

This case having been reached for argument in its regular order on the calendar, and counsel for the Plaintiff in Error having withdrawn the writ of error in open court;

Upon consideration thereof, it is

Ordered that said writ of error be and hereby is dismissed.

E. H. L.

Endorsed: United States Circuit Court of Appeals Second Circuit. U. S. ex rel. Bartlett, v. U. S. F. & G. Co. Order. United States Circuit Court of Appeals Second Circuit. Filed May 18, 1911. William Parkin, Clerk.

302 United States Circuit Court of Appeals for the Second Circuit.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY, Plaintiff in Error (Defendant Below),
against
THE UNITED STATES for the Benefit of FRANK P. BARTLETT, Defendant in Error (Plaintiff Below).

Petition for Writ of Error.

To the Honorable United States Circuit Court of Appeals for the Second Circuit:

Your petitioner, The United States Fidelity and Guaranty Company, plaintiff in error in the above entitled cause, respectfully shows:

That the above entitled cause is now pending in the United States Circuit Court of Appeals for the Second Circuit and that an order, decree and judgment has therein been rendered on the 25th day of May, 1911, affirming a judgment of the Circuit Court of the United States for the Southern District of New York, and that the matter in controversy in said suit exceeds Two thousand ($2,000.) Dollars besides costs, and that the jurisdiction of none of the Courts above mentioned is or was dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of the different States, and that this cause

does not arise under the patent laws, nor the revenue laws, nor the criminal laws, and that it is not an admiralty case, and that it is a proper case to be reviewed by the Supreme Court of the United States upon writ of error.

Your petitioner respectfully shows that heretofore and while the cause was pending in the United States Circuit Court of Ap-
303 peals for the Second Circuit a motion or application was made to the said Court by the defendant in error, to wit, the United States for the Benefit of Frank P. Bartlett, to dismiss the writ of error on the ground that the judgment being a joint one the co-defendant John F. Donovan in the Court below should have joined in the writ of error, and that thereafter such proceedings were duly had upon the said application that the same, after argument, was in all respects denied, and an order to that effect duly entered by this Court in this cause.

Therefore your petitioner would respectfully pray that a Writ of Error be allowed it in the above entitled cause, directing the Clerk of the United States Circuit Court of Appeals for the Second Circuit to send the record and proceedings in said cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of in the assignment of errors herewith filed by said plaintiff in error may be reviewed, and if error be found, corrected, according to the laws and customs of the United States.

Dated, New York, June 1, 1911.

UNITED STATES FIDELITY & GUARANTY CO.,
Plaintiff in Error,
By LEONIDAS DENNIS,
Attorney for Plaintiff in Error.

47 Cedar Street, Borough of Manhattan, City of New York.

304 The foregoing petition is granted and Writ of Error allowed as prayed for, upon the plaintiff in error giving a bond according to law in the sum of $6,500.

WALTER C. NOYES,
United States Circuit Judge.

304½ [Endorsed:] United States Circuit Court of Appeals for the Second Circuit. The United States Fidelity and Guaranty Company, Plaintiff in Error (Defendant below), against The United States for the Benefit of Frank P. Bartlett, Defendant in Error (Plaintiff below). Petition for writ of error. Leonidas Dennis, Attorney for Plaintiff in Error, 47 Cedar Street, Borough of Manhattan, City of New York. United States Circuit Court of Appeals, Second Circuit. Filed Jun- 7, 1911. William Parkin, Clerk.

305 In the United States Circuit Court of Appeals for the Second Circuit.

At Law.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY, Plaintiff in Error (Defendant Below),
against
THE UNITED STATES for the Benefit of FRANK P. BARTLETT, Defendant in Error (Plaintiff Below).

Application for Petition for Writ of Error.

Now comes The United States Fidelity and Guaranty Company, a corporation organized and existing under the Laws of the State of Maryland, plaintiff in error herein, and defendant in the Court below, presenting its petition for a Writ of Error to the Suprme Court of the United States and says:

That on or about the 25th day of May, 1911, this Court entered a judgment herein in favor of the defendant in error, and against the plaintiff in error and John F. Donovan, affirming a judgment rendered in the United States Circuit Court for the Southern District of New York, in favor of the United States for the Benefit of Frank P. Bartlett, and against The United States Fidelity and Guaranty Company and John F. Donovan for the sum of $2,960.89 and entered and filed in the office of the Clerk of said Court on the 15th day of June, 1910, and for the sum of $32.45 rendered and entered on the 25th day of May, 1911; in which judgment and proceedings prior thereunto in this case certain errors were committed to the prejudice of this plaintiff in error; all of which will more in detail ap-
306 pear from the assignment of errors which is filed with this petition.

And your petitioner presents herewith the assignment of errors, reference to which is here made, and the same is made a part of this petition, and which your petitioner prays may be allowed by this Court on the Writ of Error to the Supreme Court of the United States.

Wherefore The United States Fidelity and Guaranty Company, plaintiff in error herein, and defendant in the Court below, prays that a Writ of Error may issue in this behalf to the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Supreme Court of the United States.

Dated June 1, 1911.

LEONIDAS DENNIS,
Attorney for Plaintiff in Error, The United States Fidelity and Guaranty Company, 47 Cedar Street, Borough of Manhattan, City of New York.

307 (Endorsed:) United States Circuit Court of Appeals for the Second Circuit. The United States Fidelity and Guaranty Company, Plaintiff in Error (Defendant below), against The United States for the Benefit of Frank P. Bartlett, Defendant in Error (Plaintiff below). Petition for writ of error at law. Leonidas Dennis, Attorney for Plaintiff in Error, 47 Cedar Street, Borough of Manhattan, City of New York. United States Circuit Court of Appeals, Second Circuit. Filed Jun- 7, 1911. William Parkin, Clerk.

308 United States Circuit Court of Appeals for the Second Circuit.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY, Plaintiff in Error (Defendant Below),

against

THE UNITED STATES for the Benefit of FRANK P. BARTLETT, Defendant in Error (Plaintiff Below).

Assignment of Errors.

And now comes the Plaintiff in Error, The United States Fidelity and Guaranty Company, by Leonidas Dennis, its attorney, and says that in the record and proceedings aforesaid of said United States Circuit Court of Appeals for the Second Circuit in the above entitled cause, and in the rendition of the final order and judgment therein, manifest error has intervened to the prejudice of said plaintiff in error, in this, to wit:

1. The said Circuit Court of Appeals erred in entering on the 25th day of May, 1911, its order, decree and judgment affirming the judgment of the United States Circuit Court for the Southern District of New York for $2,960 89 damages, together with interest, and $32.45 costs, amounting in all to $2,993.34 filed and entered on the 15th day of June, 1910, in favor of said defendant in error and against said plaintiff in error and John F. Donovan.

2. That said Circuit Court of Appeals erred in not reversing the said judgment of the United States Circuit Court aforesaid, and in not remanding said cause to said United States Circuit Court for a new trial.

309 3. Said Circuit Court of Appeals erred in overruling the First assignment of error upon the record in said cause and not reversing the judgment for that error.

4. Said Circuit Court of Appeals erred in overruling the Second assignment of error upon the record in said cause and not reversing the judgment for that error.

5. Said Circuit Court of Appeals erred in overruling the Seventh assignment of error upon the record in said cause and not reversing the judgment for that error.

6. Said Circuit Court of Appeals erred in overruling the Ninth assignment of error upon the record in said cause and not reversing the judgment for that error.

7. Said Circuit Court of Appeals erred in overruling the Tenth assignment of error upon the record in said cause and not reversing the judgment for that error.

8. Said Circuit Court of Appeals erred in overruling the Thirteenth assignment of error upon the record in said cause and not reversing the judgment for that error.

9. Said Circuit Court of Appeals erred in overruling the Fifteenth assignment of error upon the record in said cause and not reversing the judgment for that error.

10. Said Circuit Court of Appeals erred in overruling the Seventeenth assignment of error upon the record in said cause and not reversing the judgment for that error.

11. Said Circuit Court of Appeals erred in overruling the Nineteenth assignment of error upon the record in said cause and not reversing the judgment for that error.

310 12. Said Circuit Court of Appeals erred in overruling the Twentieth assignment of error upon the record in said cause and not reversing the judgment for that error.

13. Said Circuit Court of Appeals erred in overruling the Twenty-second assignment of error upon the record in said cause and not reversing the judgment for that error.

14. Said Circuit Court of Appeals erred in overruling the Twenty-seventh assignment of error upon the record in said cause and not reversing the judgment for that error.

15. Said Circuit Court of Appeals erred in overruling the Twenty-ninth assignment of error upon the record in said cause and not reversing the judgment for that error.

16. Said Circuit Court of Appeals erred in overruling the Thirtieth assignment of error upon the record in said cause and not reversing the judgment for that error.

17. Said Circuit Court of Appeals erred in overruling the Thirty-second assignment of error upon the record in said cause and not reversing the judgment for that error.

18. Said Circuit Court of Appeals erred in overruling the Thirty-third assignment of error upon the record in said cause and not reversing the judgment for that error.

19. Said Circuit Court of Appeals erred in overruling the Thirty-fourth assignment of error upon the record in said cause and not reversing the judgment for that error.

20. Said Circuit Court of Appeals erred in overruling the Thirty-fifth assignment of error upon the record in said cause and not reversing the judgment for that error.

311 21. Said Circuit Court of Appeals erred in overruling the Thirty-eighth assignment of error upon the record in said cause and not reversing the judgment for that error.

22. Said Circuit Court of Appeals erred in overruling the Fortieth assignment of error upon the record in said cause and not reversing the judgment for that error.

23. Said Circuit Court of Appeals erred in overruling the Fifty-second assignment of error upon the record in said cause and not reversing the judgment for that error.

24. Said Circuit Court of Appeals erred in overruling the Fifty-fourth assignment of error upon the record in said cause and not reversing the judgment for that error.

25. Said Circuit Court of Appeals erred in overruling the Fifty-sixth assignment of error upon the record in said cause and not reversing the judgment for that error.

26. Said Circuit Court of Appeals erred in overruling the Fifty-seventh assignment of error upon the record in said cause and not reversing the judgment for that error.

27. Said Circuit Court of Appeals erred in overruling the Sixty-ninth assignment of error upon the record in said cause and not reversing the judgment for that error.

28. Said Circuit Court of Appeals erred in overruling the Seventieth assignment of error upon the record in said cause and not reversing the judgment for that error.

29. Said Circuit Court of Appeals erred in overruling the Seventy-first assignment of error upon the record in said cause and not reversing the judgment for that error.

312 30. Said Circuit Court of Appeals erred in overruling the Seventy-second assignment of error upon the record in said cause and not reversing the judgment for that error.

31. Said Circuit Court of Appeals erred in overruling the Seventy-third assignment of error upon the record in said cause and not reversing the judgment for that error.

32. Said Circuit Court of Appeals erred in overruling the Seventy-fourth assignment of error upon the record in said cause and not reversing the judgment for that error.

33. Said Circuit Court of Appeals erred in overruling the Seventy-fifth assignment of error upon the record in said cause and not reversing the judgment for that error.

34. Said Circuit Court of Appeals erred in overruling the Seventy-eighth assignment of error upon the record in said cause and not reversing the judgment for that error.

35. Said Circuit Court of Appeals erred in rendering its order, decree and judgment against the plaintiff in error, and in favor of said defendant in error, for costs of suit in said Circuit Court of Appeals.

36. Said Circuit Court of Appeals erred in its construction and application of the Act of Congress of the United States, approved August 13, 1894, and found in 28 Statutes 280, United States Compiled Statutes, 1901, page 2523, providing, among other things, that the contractor shall give bond to the United States that the contractor shall make full payment to all persons supplying him labor or materials in the prosecution of the work, referred to and alleged in Paragraph "Third" of the plaintiff's complaint herein, and that said order, decree and judgment of the said Circuit Court of Appeals should have been in favor of the plaintiff in error in-

313 stead of in favor of the defendant in error.

Wherefore the said The United States Fidelity and Guaranty Company, plaintiff in error, prays that for the errors aforesaid and for other errors appearing in the record of the said United

States Circuit Court of Appeals in the above entitled cause, to the prejudice of the plaintiff in error, that the said order, decree and judgment of the said United States Circuit Court of Appeals entered in the office of the Clerk of said Court on the 25th day of May, 1911, be reversed, annulled and for naught esteemed, and that said cause be remanded to the United States Circuit Court for the Southern District of New York with instructions to grant a new trial in said cause, or for such further proceedings in said cause as may be determined by this Honorable Court, to the end that justice may be done in the premises.

Dated, June 1, 1911.

LEONIDAS DENNIS,
Attorney for Plaintiff in Error.

47 Cedar Street, Borough of Manhattan, City of New York.

314 (Endorsed:) United States Circuit Court of Appeals for the Second Circuit. The United States Fidelity and Guaranty Company, Plaintiff in Error (Defendant below), against The United States for the Benefit of Frank P. Bartlett, Defendant in Error (Plaintiff below). Assignment of error. Leonidas Dennis, Attorney for Plaintiff in error, 47 Cedar Street, Borough of Manhattan, City of New York. United States Circuit Court of Appeals, Second Circuit. Filed Jun- 7, 1911. William Parkin, Clerk.

315 At a Term of the United States Circuit Court of Appeals for the Southern District of New York, Second Circuit, Held at the Post Office Building, in said District, in the Borough of Manhattan, on the 7th Day of June, 1911.

Present: Honorable Walter C. Noyes, Judge of the Circuit Court of Appeals for the Second Circuit.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY, Plaintiff in Error (Defendant Below),
against
THE UNITED STATES for the Benefit of FRANK P. BARTLETT, Defendant in Error (Plaintiff Below).

This 7th day of June, 1911, came the defendant United States Fidelity & Guaranty Co., by its attorney, Leonidas Dennis, Esq., and filed herein and presented to the Court its petition praying for the allowance of a Writ of Error and assignment of errors intended to be urged by it, praying also that a transcript of the records and proceedings, and papers upon which the judgmen, herein was rendered duly authenticated, may be sent to the Supreme Court of the United States, that such other and further proceedings may be had as may be proper in the premises.

On Consideration Whereof the Court does allow the Writ
316 of Error upon the defendant United States Fidelity & Guaranty Co. giving bond according to law in the sum of $6,500

which shall operate as a supersedeas bond, conditioned that if the above named The United States Fidelity and Guaranty Company, plaintiff in error, shall prosecute its Writ of Error to effect and answer all damages and costs if it fail to make its plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and effect. And it is accordingly

Ordered: that a writ of error be and hereby is allowed to have reviewed in the Supreme Court of the United States the judgment entered herein in favor of the defendant in error, and against the plaintiff in error and John F. Donovan, affirming a judgment rendered in the United States Circuit Court for the Southern District of New York, in favor of the United States for the Benefit of Frank P. Bartlett, and against The United States Fidelity and Guaranty Company and John F. Donovan for the sum of $2,960.89, and entered and filed in the Office of the Clerk of said Court on the 15th day of June, 1910, and for the sum of $32.45 rendered and entered on the 25th day of May, 1911; and it is

Further Ordered: that upon the making and filing with the Clerk of this Court of a good and sufficient bond in said sum by the said defendant, the United States Fidelity and Guaranty Company, all further proceedings be superseded and stayed until the final determination of said writ of error by the said Supreme Court of the United States, and until the further order of this Court.

WALTER C. NOYES,
United States Circuit Judge.

317 (Endorsed:) U. S. Circuit Court of Appeals. The United States F. and G. Company, Plaintiff in Error, against The U. S. for Frank P. Bartlett, Defendant in Error. Order for Supersedeas. Leonidas Dennis, Attorney for Plaintiff in Error. Borough of Manhattan, New York City. United States Circuit Court of Appeals, Second Circuit. Filed Jun- 7, 1911. William Parkin, Clerk.

318 Copy.

No. 19310.

The Title Guaranty & Surety Company,
Scranton, Pennsylvania.

Capital and Surplus Over $1,000,000.

Bond No. —.

United States Circuit Court of Appeals for the Second Circuit.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY, Plaintiff in Error (Defendant Below),
against
UNITED STATES for the Benefit of FRANK P. BARTLETT, Defendant in Error (Plaintiff Below).

Know all men by these presents, That, The Title Guaranty & Surety Company, a corporation organized under the laws of the State

of Pennsylvania, and authorized to transact business in the State of New York, and having an office and place of business at #84 William Street, Borough of Manhattan, City of New York, is held and firmly bound unto the United States, for the Benefit of Frank P. Bartlett, in the sum of six thousand five hundred dollars, lawful money of the United States, to be paid to the said United States for the Benefit of Frank P. Bartlett above named, and for which payment well and truly to be made, it binds itself and its successors, jointly and severally, firmly by these presents.

Sealed with its seal and dated this 7th day of June, 1911.

Whereas the above named, The United States Fidelity and Guaranty Company has prosecuted its writ of error to the United States Supreme Court, to reverse the order and judgment rendered in the above entitled cause by the United States Circuit Court of Appeals on the 25th day of May, 1911, affirming a judgment rendered in the United States Circuit Court for the Southern District of New York, in favor of the United States for the benefit of Frank P. Bartlett, and against The United States Fidelity and Guaranty Company and John F. Donovan, for the sum of two thousand nine hundred sixty and 89/100 ($2,960.89) dollars, and entered and filed in the office of the Clerk of said Court on the 15th day of June, 1910, and for the sum of thirty-two and 45/100 ($32.45) dollars, rendered and entered on the 25th day of May, 1911:

Now, therefore, the condition of the above obligation is such that if the above named The United States Fidelity and Guaranty Company, Plaintiff in Error, shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good, and shall in the event of the affirmance of the judgments aforesaid, or the dismissal of the Writ of Error, pay the aforesaid judgments, together with all interest, damages and costs, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

319

THE TITLE GUARANTY & SURETY COMPANY,
By FRED C. WILLIAMS, *Attorney-in-Fact.*

Attest:

[SEAL.] GEO. W. YUENGLING,
Resident Secretary.

320 STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

On Jun- 7, 1911, before me personally appeared Fred C. Williams, to me known, who being by me duly sworn, did depose and say; that he resided in the Borough of Chatam, N. J.; that he is the Attorney-in-Fact of The Title Guaranty & Surety Company, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said corporation do not exceed its assets, as ascertained in the manner provided by Section 3, Chapter 720, of the New York Session Laws of 1893.

And the said Fred C. Williams further said, that he was acquainted with Geo. W. Yuengling and knew him to be the Resident Secretary of said corporation; that the signature of said George W. Yuengling subscribed to the said instrument is in the genuine handwriting of said Geo. W. Yuengling and was thereto subscribed by like order of said Board of Directors and in the presence of him, the said Fred C. Williams.

ALFRED J. HOOK,
Notary Public, Kings County, N. Y.

Certificate filed in New York County.

At a meeting of the Executive Committee of The Title Guaranty & Surety Company, Scranton, Penn., held at the office of the Company, on the 24th day of December, A. D., 1910, the following resolution was adopted:

Resolved, that this Company do and it hereby does authorize and empower Fred C. Williams, as Attorney-in-Fact, attested by Geo. W. Yuengling, Resident Secretary, or Richard K. McGonigal, Resident Assistant Secretary; or Geo. W. Yuengling, Attorney-in-fact, attested by Richard K. McGonigal, Resident Assistant Secretary, to execute, deliver and attach the seal of the Company to any and all bonds, recognizances or contracts of indemnity, and all instruments of reinsurance, and all other writings obligatory in the nature thereof, and all contracts guaranteeing the fidelity of persons holding places of public or private trust, guaranteeing the performance of contracts and executing and guaranteeing bonds or undertakings required or permitted in all actions or proceedings or by law allowed.

STATE, CITY AND COUNTY OF NEW YORK, *ss:*

I, Geo. W. Yuengling, Resident Secretary of The Title Guaranty & Surety Company, have compared the foregoing resolution with the original thereof, as recorded in the Minute Book of said Company, and do hereby certify that the same is a correct and true transcript therefrom, and of the whole of said original resolution. Given under my hand and the seal of the Company at the City of New York, on Jun- 7, 1911.

GEO. W. YUENGLING,
Resident Secretary.

Statement of Condition of The Title Guaranty & Surety Company at the Close of Business March 31, 1911.

Resources.

Cash on Hand and in Banks	$71,609.87	
Real Estate	120,204.82	
Mortgages	152,176.20	
Bonds, Market Value	1,027,048.92	
Premiums in Course of Collection, Net	194,082.63	
Bills Receivable and Advances on Contracts	212,506.67	
Accrued Interest	12,197.28	
		$1,789,826.39

Liabilities.

Premium Reserve		$353,265.55
Reserve for Claims		308,699.16
Reserve for Payment of Taxes		8,151.12
Capital Stock	$1,000,000.00	
Surplus	119,710.56	
		1,119,710.56
		$1,789,826.39

STATE, CITY, AND COUNTY OF NEW YORK, *ss:*

Geo. W. Yuengling, being duly sworn, says that he is the Resident Secretary of The Title Guaranty & Surety Company, and that the foregoing is a correct statement of the financial condition of said Company on March 31, 1911, to the best of his knowledge and belief, and that the financial condition of said Company is as favorable now as it was when such statement was made.

GEO. W. YUENGLING,
Resident Secretary.

Sworn to and subscribed before me on Jun- 7, 1911.

ALFRED J. HOOK,
Notary Public, Kings County, N. Y.

Certificate filed in New York County.

321 [Endorsed:] U. S. Circuit Court of Appeals for 2nd Circuit. The United States Fidelity & Guaranty Company, Plaintiff in error (Defendant below), against United States for the Benefit of Frank P. Bartlett, Defendant in Error (Plaintiff below). Supersedeas Bond. Surety: The Title Guaranty & Surety Company, 84 William Street. United States Circuit Court of Appeals, Second Circuit. Filed Jun- 7, 1911. William Parkin, Clerk.

Approved as to form and also as to sufficiency of sureties, with reservation, however, to the defendant in error of the right at any time to examine the proper officers of the Surety Company, under oath, touching its assets, liabilities, and financial condition generally.

WALTER C. NOYES,
U. S. Circuit Judge.

322 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby Certify that the foregoing pages, numbered from 1 to 321 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of United States Fidelity & Guaranty Company, Plaintiff in Error, against United States, for the benefit of Frank P. Bartlett,

Defendant in Error, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 12th day of June in the year of our Lord One Thousand Nine Hundred and eleven and of the Independence of the said United States the One Hundred and thirty-fifth.

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk.*

323 *By* The Honorable One of the Judges of the United States Circuit Court of Appeals for the Second Circuit, to the United States of America for the Benefit of Frank P. Bartlett, Defendant in Error, Greeting:

You are hereby cited and admonished to be and appear before the Supreme Court of the United States at the City of Washington in the District of Columbia, on the 7th day of July, 1911, pursuant to a Writ of Error filed in the Clerk's Office of the United States Circuit Court of Appeals for the Second Circuit, wherein The United States Fidelity and Guaranty Company is the plaintiff in error, and the United States of America for the benefit of Frank P. Bartlett, is the defendant in error, and you are to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said Writ of Error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the Borough of Manhattan in the City of New York, in the District and Circuit above named this 7th day of June, in the year of our Lord One thousand nine hundred and eleven, and of the Independence of the United States the One Hundred and Thirty-Sixth.

WALTER C. NOYES,
Judge of the United States Circuit Court of Appeals for the Second Circuit.

324 [Endorsed:] United States Circuit Court of Appeals for the Second Circuit. The United States Fidelity and Guaranty Company, Plaintiff in Error (Defendant below), against The United States for the Benefit of Frank P. Bartlett, Defendant in Error (Plaintiff below). Orig. Citation. Leonidas Dennis, Attorney for Plaintiff in Error, 47 Cedar Street, Borough of Manhattan, City of New York. Copy received June 8th, 1911. Edward W. Norris, Att'y for Defendant in Error. United States Circuit Court of Appeals, Second Circuit. Filed Jun- 12, 1911. William Parkin, Clerk.

325 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable, the Judges of the Circuit Court of the United States for the Southern District of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you or some of you, between the United States for the Benefit of Frank P. Bartlett, plaintiff, and The United States Fidelity and Guaranty Company and John F. Donovan, defendants, a manifest error hath happened to the great damage of The United States Fidelity and Guaranty Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 7th day of June in the year of our Lord, One thousand nine hundred and eleven.

[Seal United States Circuit Court of Appeals Second Circuit.]

WM. PARKIN, *Clerk.*

The foregoing writ is hereby allowed.

WALTER C. NOYES,
U. S. Circuit Judge.

326 [Endorsed:] United States Circuit Court of Appeals for the Second Circuit. The United States Fidelity and Guaranty Company, Plaintiff in Error (Defendant below), against The United States for the Benefit of Frank P. Bartlett, Defendant in Error (Plaintiff below). Writ of error. Leonidas Dennis, Attorney for Plaintiff in Error, 47 Cedar Street, Borough of Manhattan, City of New York. Copy received June 8, 1911. Edward W. Norris, Att'y for Defendant in Error. United States Circuit Court of Appeals, Second Circuit. Filed Jun- 12, 1911. William Parkin, Clerk.

Endorsed on cover: File No. 22,788. U. S. Circuit Court Appeals, 2d Circuit. Term No. 50. The United States Fidelity and Guaranty Company, plaintiff in error, vs. The United States for the Benefit of Frank P. Bartlett. Filed July 3d, 1911. File No. 22,788.

Supreme Court of the United States

OCTOBER TERM, 1922

No. 36

THE UNITED STATES FIDELITY AND GUARANTY COMPANY,

Plaintiff-in-error,

vs.

THE UNITED STATES FOR THE BENEFIT OF FRANK F. BARTLETT,

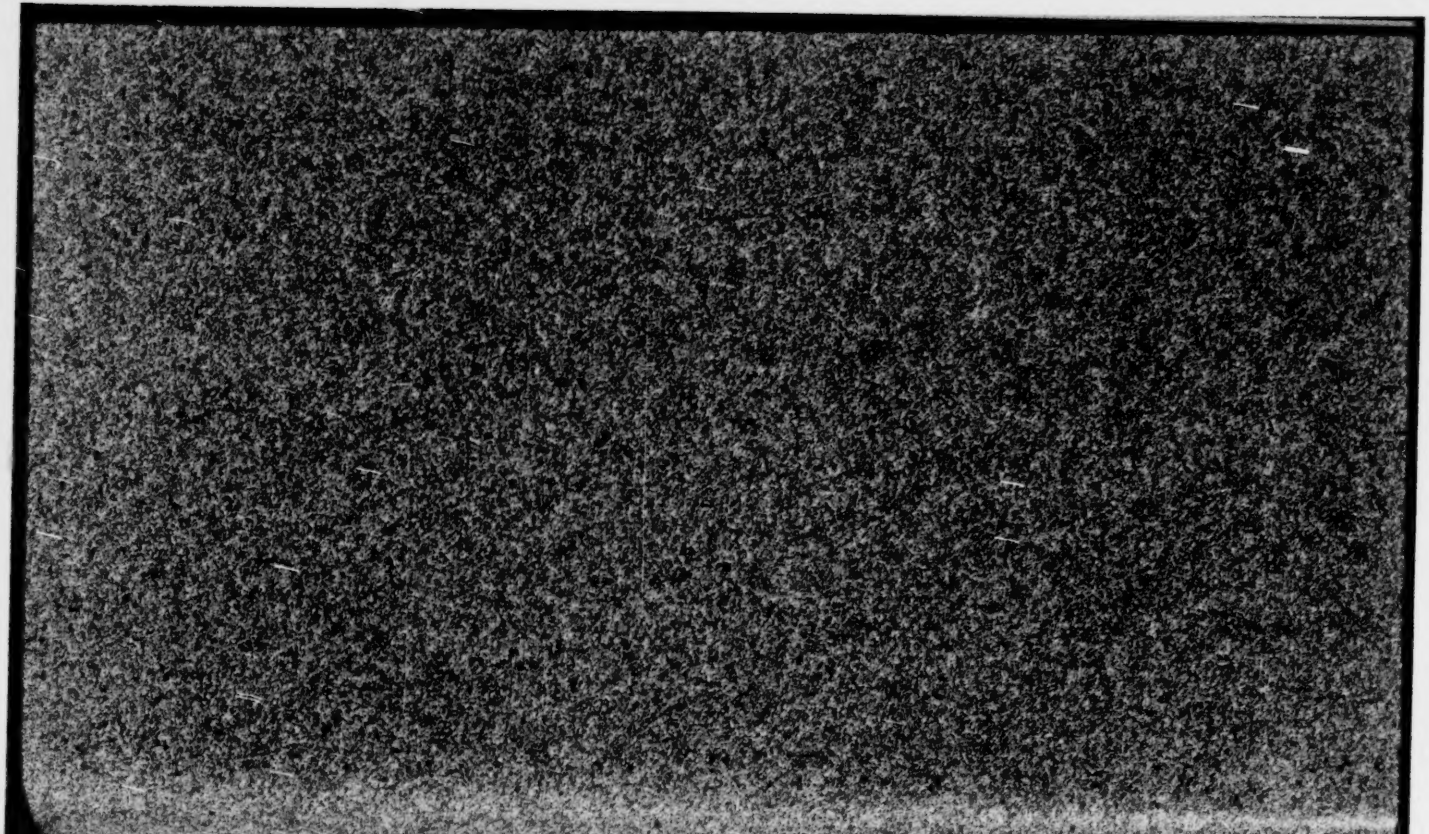
Defendant-in-error.

In Error to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR PLAINTIFF-IN-ERROR

LEONIDAS DENNIS,
Attorney for the United States Fidelity and Guaranty Company,
New York.

EMANUEL J. MYERS,
GORDON S. T. KLEINHANS,
Counsel.



INDEX.

PAGE

1. Statement 1
   1. The issues in the cause 2
   2. The Facts 3
2. Argument and Points 9
   First: Neither the Act of Congress nor the terms of the bond warrant a recovery for preparation for the performance of the contract 9
   Second: No assignment of the wages to be thereafter earned was proven sufficient to sustain a recovery in an action at law, but the transaction at most only constituted an equitable assignment, enforcible only in equity, and cognizable at law only after it had been legally completed or established 16
      1. An equitable title in insufficient in the Federal Courts to sustain an averment of legal title alleged in an action at law, and required to sustain judgment therein 16
      2. An assignment at law must be of a perfect and choate cause of action and not predicated upon that which is to be earned *in futuro* and to accrue upon the performance of acts subsequent to the promise to assign 17
      3. The transaction constituted, at the most, only an equitable assignment of the laborers' wages which was only capable of being enforced in equity 18
   Third: "The claim against *The Surety* was a fraud in law" because:
      1. The demand upon *The Surety* was for a wilfully exaggerated and unconscionable amount which the creditor knew was not due when he made the demand.... 21
      2. The demand was inextricably confounded with items constituting the largest part

PAGE

thereof, not recoverable under *The Surety's* undertaking 21

I. It is established law that a claim of lien for a wilfully exaggerated and unconscionable amount cannot be enforced against the owner even for the actual amount that may be due 23

II. Where the items for which a lien can be claimed are inextricably blended and intermingled with items for which no right of lien can be urged, the action cannot be maintained 28

Fourth: The creditor was guilty of such gross laches and delay in presenting his claim to the *The Surety* that, followed by the withdrawal of retained percentages, and the insolvency of the principal, bars recovery 30

Fifth: The admissions and declarations of Hughes Bros. & Bangs, who were sub-contractors of the principal in the bond, were inadmissible and incompetent as against *The Surety*... 33

Conclusion 36

INDEX OF AUTHORITIES.

Act of Congress—Appendix 37

Aeschlimann v. *Presbyterian Hospital*, 165 New York, 296 25

Ayer v. *Getty*, 46 Hun, New York, 287, 288 33

Bocard v. *State*, 79 Indiana, 270 33

Camden Iron Works v. *Camden*, 60 N. J. Eq., 211, 214 23

City Trust Co. v. *United States*, 147 Fed. Rep., 155..9, 15

Equitable Savings and Loan Assn. v. *Hewitt*, 55 Oregon, 329 27

Greenleaf Evidence, Section 187 (16th Ed., Note 1) 33

Hatch v. *Elkins*, 65 New York, 489, 496 33

Haynes v. *Holland*, 48 South Western Rep., 400.... 16

Hovey v. *Elliott*, 118 New York, 124 18

Howe v. *Farrington*, 16 Hun, New York, 591..... 33

Industrial and General Trust, Ltd., v. *Tod*, 180 New York, 215, at pages 225, 226 24

PAGE

Kennedy v. *Commonwealth*, 182 Mass., 480 ..... 15, 22
Knott v. *Peterson*, 125 Iowa, 404 33
Lane v. *Jones*, 79 Alabama, 156 23
Lee v. *Brown*, 21 Kansas, 458 33
Levi v. *Mathews*, 145 Fed. Rep., 152, 154 17
Matter of Black, 138 App. Div. (New York), 562 17
Pacific Mutual Life Ins. Co. v. *Webb.*, 157 Fed. Rep., 155 17
Philadelphia v. *Malone*, 214 Penn. St. Rep., 90 15
Rae v. *Beach*, 76 New York, 164, 168 33
Ridings v. *Johnson*, 128 U. S., 212 16
Schulenburg Co. v. *Strimple*, 33 Mo. App., 154.... 28
Schaghticoke Powder Co. v. *Greenwich and J. Ry. Co.*, 183 New York, 306 15
Troy Public Works Co. v. *City of Yonkers*, 207 New York, 81 15
Title G. and T. Co. v. *Puget Sound Engine Works*, 163 Fed. Rep., 168, at page 174; affirmed *sub. nom.* 22
Title G. and T. Co. v. *Crane Co.*, 219 U. S., 34 22
Union Trust v. *Bulkeley*, 150 Fed. Rep., 510 19
United States v. *Hyatt*, 92 Fed. Rep., 155 9
United States v. *Morgan*, 111 id., 474 9
United States v. *Kimpland*, 93 id., 403 9
United States v. *Fidelity and Deposit Company of Maryland*, 86 App. Div. (New York), 175...11, 22
United States v. *Conkling*, 135 Fed. Rep., 508.... 28
United States v. *American Bonding and Trust Co.*, 89 Fed., 921 32
United States F. and G. Co. v. *United States*, 191 U. S., 416 32
United States v. *Ansonia Brass, etc., Co.*, 218 U. S., 452, 471 22
Uthoff v. *Gerhard*, 42 Mo. App., 256 23
Wheeler v. *State*, 56 Tenn., 393 33
White v. *Bank*, 56 Tenn., 475 33

IN THE

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 50.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
Plaintiff-in-error,

versus

THE UNITED STATES, FOR THE BENEFIT OF FRANK P. BARTLETT,
Defendant-in-error.

BRIEF FOR PLAINTIFF-IN-ERROR.

Statement.

This is a writ of error to review a judgment of the United States Circuit Court of Appeals for the Second Circuit, filed on the 18th day of May, 1911, affirming a judgment of the United States Circuit Court for the Southern District of New York against the plaintiff-in-error.

The Issues in the Cause.

This action was begun in the United States Circuit Court for the Southern District of New York on the 25th day of May, 1909, by the United States for the use and benefit of Frank P. Bartlett against John F. Donovan and the United States Fidelity and Guaranty Company (hereinafter called *The Surety*) to recover the sum of $7,171.28 for labor and services upon a bond executed October 13, 1902, in pursuance of an Act of Congress of August 13, 1894 (28 Stat. at Large, 278, chap. 280, U. S. Comp. Stat., 1901, p. 2523), to secure the performance of a contract theretofore entered into, dated the 18th day of February, 1903, with Major George W. Goethals for and in behalf of the United States of America, to furnish and deliver all the material and do all the work of breakwater construction required for Harbor of Refuge at Point Judith, Rhode Island (Transcript of Record, fols. 18-19, 37-38).

See provisions of the Act of Congress, Appendix, *post*, page 37.

The Surety resisted liability upon the following grounds:

I. That it was sought to be charged with labor and materials which were not rendered or performed "in the prosecution of the work."

II. That no assignment of the wages was proven, but at most an agreement to assign the wages when earned, insufficient to sustain an action at law and only cognizable in equity.

III. That the claim made against *The Surety* is fraudulent in law, because:

1. It is so grossly and unconscionably exaggerated as to defeat any right of recovery.

2. It inextricably confounds and intermingles items which are not within the terms of the bond.

IV. That the creditor was guilty of such laches followed by insolvency of the principal and the withdrawal of percentages, as to bar recovery against and discharge *The Surety*.

Judgment was entered against *The Surety* for $2,960.89, wherefrom a writ of error was prosecuted by *The Surety* to the Circuit Court of Appeals, which affirmed the judgment in all respects, and which *The Surety* seeks to review in this Court by writ of error.

Statement of Facts.

(*Figures in parentheses are references to folios as well as pages of the Transcript of Record.*)

John F. Donovan on February 18, 1903, entered into an agreement with Major George W. Goethals to furnish and deliver all the material and do all the work of breakwater construction required for Harbor of Refuge at Point Judith, Rhode Island (37-42, *pp.* 21-24), and also delivered the bond of the United States Fidelity and Guaranty Company as surety, conditioned for the performance of the contract and that THE CONTRACTOR shall promptly make full payments to all persons supplying him labor or materials in the prosecution of the work" (18-19, *p.* 11).

THE CONTRACTOR, having no plant which would enable him to perform the contract (133, 136, *pp.* 71-2), made an arrangement with Hughes Bros. &

Bangs, in whose employment he then was and had been for some years, to perform the contract, and agreed to turn over to that firm the estimates which should be received from the government (120, 121, 123, *pp.* 64-5; 117, *p.* 62; 134, 136, *pp.* 71-2).

Hughes Bros. & Bangs owned a quarry at Sachems Head, Connecticut, about fifty miles distant from the breakwater at Point Judith, where the stone was to be quarried and carried by water transportation to the breakwater (136, *p.* 72; 123, *p.* 65).

Hughes Bros. & Bangs entered into an agreement with Frank P. Bartlett (to whose use this action was brought) to hire and engage the men to open and run the quarry and to get out the stone for the breakwater (52, *p.* 28; 64, 65, 68, *pp.* 35-6; 71, *p.* 38), and to open a commissary at the quarry to supply the workmen there employed with provisions and merchandise (137, 138, *p.* 73; 74, *p.* 92).

Bartlett was given the privilege of conducting a commissary store at the quarry where the men employed in the quarry could purchase supplies and merchandise on credit, and it was understood between Hughes Bros. & Bangs and Bartlett that at the end of each month Bartlett should send a statement showing the amount of the purchases made by the several workmen and such amount would be deducted from the wages earned, and be retained by Hughes Bros. & Bangs to be paid to Bartlett (123, *p.* 65; 136-8, *p.* 73).

At the time Bartlett engaged each of the men to work at the quarry he told them of this arrangement, and they acquiesced therein and *assigned* (?) their anticipated wages to him for payment or reimbursement in advance of the purchases as well as advances of cash, rent, etc., made during the current month.

Bartlett undertook the entire charge, management and operation of the *quarry* in every detail and the cost thereof to the extent of the amount unpaid by Hughes Bros. & Bangs is sought to be charged against *The Surety* (64, *p.* 35; 68, *p.* 37; 71, *p.* 38).

Bartlett opened and operated the quarry—*i. e.*, hired all the men (71-3, *pp.* 38-9), fixed the wages (69), discharged the men (71-3, *pp.* 38-39), directed repairs, etc. (77, *pp.* 41)—from March, 1903, until November, 1903, at the end of which time he claimed that *The Surety* was liable for a balance of $7,171.28 due from Hughes Bros. & Bangs.

The Record shows that the land was opened and prepared for quarrying stone therefrom, and that the entire cost of operation, from stripping the earth from the stone to its removal and transportation to the breakwater *fifty miles from the quarry*, was charged against *The Surety* and recovery therefor sustained in the LEARNED COURTS below.

The account of the work, labor and services furnished by Mr. Bartlett included all the men excepting three (139, *p.* 74), who worked in the quarry, and contained a statement of provisions, board, rent and money furnished the men (104-5, *pp.* 55-6; 108, *p.* 57; 139, *p.* 74). The account of the men *actually* employed on the breakwater was separately kept by Mr. Bartlett (102, *p.* 54).

The evidence showing the nature and character of the work, instrumentalities employed and charges therefor as to which *The Surety* resists payment is arrayed, viz.:

Mr. Bartlett testified: There was "no difference in giving out numbers between the man who repaired the derricks and the man who blasted or fired off the blast; there was no difference in keeping the record; all were treated alike; that is, the

men who did repairs to the derrick, the man who mended tools and the men who drove horses were all treated alike and given a number. I did not keep different accounts for them" (77-9, *pp.* 41-2).

"I had somebody to take care of the horses. He had to feed and groom the horses. He was treated the same as the men on the scow; the same as any other laborer. The bill was collected the same way, and added up in the same way, and spent in the same way. I did not present any different bill for them, the hoisting engineer or foreman, I put it right there in the book" (79, *p.* 42).

Then the net amount of the bill or statement furnished by Mr. Bartlett was credited to his account (144, *p.* 77), and a check was sent him (146, *p.* 78) to pay for such supplies furnished to the men (66, *p.* 36).

The men who worked at the quarry were designated by a number (73-4, *p.* 39; 140, *p.* 74), while the men on the breakwater were designated by name (140, *p.* 74).

The distinction is significant and should be noted because the men at the breakwater were *on* the work, while the quarry was a different operation, *fifty miles away* (102, *p.* 54).

The maximum number of men employed at the quarry was 150 in the different pursuits and occupations incident to the operation of a quarry (140, *p.* 74), *i. e.*:

There were men who drilled the holes in the rock preparatory to the blast (72, *p.* 39; 142, *p.* 75).

Men to operate the derricks right in the quarry (where the stone was blasted) to place the stone on the tram cars (143, *p.* 76). Men in charge of the explosives (143, *p.* 76; 124, *p.* 66), and men in charge of and to fire the battery (78, *p.* 41; 124-5, *p.* 66).

Crews for the derricks on the wharves (112, *p.* 75), where the stone was loaded on the scows (124-5, *pp.* 66-7).

Men attending to the stripping the earth to get at the stone (72, *p.* 39; 143, *p.* 76), and removing the debris at the quarry (72, *p.* 39; 143, *p.* 76).

Blacksmith shops and force (64-5, *p.* 35; 124-5, *p.* 66).

Carpenters to repair scows, derricks and barges (64, *p.* 35), cars (65, *p.* 35), tracks (65, *p.* 35), and derricks (65, *p.* 35; 124-5, *p.* 66).

Caring for and feeding horses; horses and drivers in hauling the tram cars up to the quarry treated as one number (65, *p.* 36; 112, *pp.* 75-6). Horses and drivers had numbers at so much per day on the payroll (112, *pp.* 75-6).

As a result of these different industries the stone was taken down to the dock and then transferred in barges and scows (112, *pp.* 75-6; 64, *p.* 35), which carried the stone to the point where the breakwater was being constructed for the United States Government (111, *p.* 59), where there was a Government inspector who showed the captain of the tug, or of the crew, where the stone was to be taken out of the scow and dumped on the breakwater (55, *p.* 30; 143, *p.* 76), according to the location set by the inspector in charge (Specifications, 30, *p.* 17).

At the breakwater there were eight or ten or fifteen men present when the scow came—actually engaged on the work, placing the stone (126, 87). Their duties consisted of unloading the scow and placing the stone in the proper place. The Government inspector was stationed out there (55, *p.* 30; 126, *p.* 67).

A clear distinction was recognized between the men who *worked on the breakwater* (140, *p.* 71), who were enrolled by their proper names (77, *p.*

41; 140, *p.* 74), and the men who were *employed in the quarry*, who were designated by numbers (94, *p.* 50; 108, *p.* 57; 140, *p.* 74).

The reasons why are stated:

> "I kept separate the scowmen from the laborers because the scowmen, they was off on the breakwater * * * because the quarrymen they work in the quarry and the other men was off Point Judith" (102, *p.* 54).

The contract was completed November 8, 1903, and the last retained percentages amounting to $9,566.44 were paid by the Government on December 22, 1903.

THE SUB-CONTRACTORS who had continued the work became insolvent in January, 1907, and May, 1908.

No demand was served upon *The Surety*, nor was it informed of the claim in suit, until the action was commenced on May 25, 1909 (80-1, *pp.* 42-3).

The creditor sought to recover $7,171.28 with interest from December 1, 1903 (Complaint, 7, *p.* 4), having testified that *he had only been paid* $2,829.60 (57, *p.* 31).

That this was an attempt to perpetrate a gross fraud on *The Surety* was shown by the testimony, which was given by his witness, Mr. Donovan, who testified that Bartlett had been paid sums aggregating $7,947.28 (see Exhibit F, 207, *p.* 114; 151-2, *pp.* 80-81).

The same witness, before being confronted with entries (151, *p.* 80), testified that there would be between $5,000 and $6,000 due to Mr. Bartlett (115, *p.* 77).

But the accounts, Exhibits F, G and H (207-8, *p.* 114), compelled the witness to testify otherwise and compelled the counsel to concede that the pay-

ments amounted to $7,947.29, but the cards, however, show that the account was paid in full (208, *p.* 114).

The Federal Contracting Co. was incorporated under the laws of the State of New York November 29th, 1902, and took over the business of Hughes Brothers and Bangs, including the work in question (133, *p.* 71).

After the Federal Contracting Co. had conducted the business it was transferred to the Breakwater Construction and Engineering Co., a corporation (117-8, *pp.* 78-9).

ARGUMENT.

POINTS.

FIRST.

Neither the Act of Congress nor the terms of the bond warrant a recovery for preparation for the performance of the contract.

CITY TRUST CO. v. UNITED STATES, 147 Fed. Rep., 155, at page 157.
UNITED STATES v. HYATT, 92 *id.*, 442.
UNITED STATES v. MORGAN, 111 *id.*, 474, at page 488.
UNITED STATES v. KIMPLAND, 93 *id.*, 403, at page 406.

As the contract only provides for the furnishing and placing stone on the breakwater at Point Judith, the cost of opening and preparing a quarry, quarrying stone thereat and transporting the same therefrom to the breakwater fifty miles distant is not within the terms of *The Surety's* undertaking.

The provision of the Act of Congress is printed *post*, page 37.

This question is presented by the motion to dismiss the complaint ("Second" and "Sixty-third" Assignments of Error, 214, *p.* 117; 248, *p.* 135); to direct the verdict ("Eightieth" Assignment of Error, 256-7, *p.* 139); and by the exception taken to the charge of the learned Trial Court ("Seventy-third" Assignment of Error, 252, *p.* 137; 171-2, *pp.* 91-2; 178, *p.* 95), which instructed the jury as follows:

> "Now, Bartlett, the relator in this case, did not perform labor and he did not supply material, but he comes here as an assignee of the laborers' claims. The first question is, what those laborers' claims were. Assuming for the time being that he as assignee can stand in the shoes of the laborers themselves, the laborers were at the quarry for the most part at Sachem's Head, some fifty or sixty miles from the breakwater, and their work consisted of some various things; part of it was actually drilling and blasting of stone which was used in the breakwater, and part was incidental to that drilling and blasting, such as sharpening of the drills when they became rusty, repairs of the cars as things became broken. There was a small tramway and by that tramway stone was taken from the quarry down to the Sound where scows lay which carried the stones to Point Judith through the Sound to Watch Hill. Part of the work was the carpenter's in repairing the derricks if they became injured in the progress of the work, as was the case, I assume, on account of its heavy, rough character. In any event, such labor was performed in keeping these derricks so that they could heist the stone and in keeping the cars so that they could carry the stone, and in general making it possible to carry on the work. Now, all that work, all that labor, I charge you was work done in the prosecution of the work, and it is work for which the laborers could themselves recover under this bond" (171, 172, *pp.* 91-2).

The agreement clearly and specifically indicates:

1. The material to be furnished.

2. The work to be done, and

3. The place where the work is to be done.

The specifications define each of the conditions and elements guaranteed by the surety:

> "34. The work to be done is the construction of a rip rap breakwater extending out from the shore of Point Judith, R. I. (27, *pp.* 15-16).
>
> 36. The core may be built of any sized stones, exceeding fifty pounds per piece. The facing or covering stone must be composed of stones weighing at least three tons each (27, *pp.* 15-16).
>
> 38. The vessels, scows and lighters in which the rip rap stone is delivered (28-9, *pp.* 16-17).
>
> 40. The location of the work will be marked in advance by the inspector (30, *p.* 17).
>
> 43. All plant employed on the work must be so placed * * *" (31, *p.* 18).

Within none or all of these provisions can there be found any warrant to impose on the surety the *entire* cost of *creating* or producing the material that the contractor obligates himself to furnish.

Within all canons of judicial construction and limitations of legal liability, the specifications of fact contained within the agreement should afford the test of the liability guaranteed or assumed by the surety within the broadest and most liberal interpretation in behalf of the guaranteed or assured invoking the protection of the bond.

That the liability of the surety includes and

rests finally at the place of performance named in the contract cannot be gainsaid, and is recognized in all the adjudications as defining the labor which is secured, but that its liability attaches in the cost of preparation to perform the contract finds its first adjudication in the case at bar.

For in the case at bar the surety is held liable for the first furrow, the first sweeping of the earth to lay bare the stone and the first stationing of the drill that will bore the hole to hold the charge that is to blast the granite ridges which, riven asunder, *may* ultimately become part of the breakwater.

Broadly and definitely the agreement between the United States and the contractor provides (37, *p.* 21).

> "*Furnish and deliver all the material and do all the work of breakwater constructing required for Harbor of Refuge, at Point Judith, R. I.*, conforming in all respects to the specifications hereto attached." * * *
>
> "*For stone in position in the work at the rate of Two* (82) *Dollars* and seventy-five ($.75) cents per ton" (38, *p.* 21).

The bond equally clear and specific provides the contractor shall

> "make full payments to all persons supplying him labor or materials in the prosecution of the work."

These principles which have passed into adjudication may yield *criteria* to determine the soundness of the judgment herein and demand its reversal.

1. Instrumentalities and plant (*i. e.*, cost of) capable of general use by the contractor cannot be recovered in this action.

This includes cost of repair and maintenance, even though *at* and *on* the work.

Tested by this, carpenters who kept the plant at the quarry in repair and condition, men who had charge of the explosives, men employed to feed and drive the horses hauling the cars back and forth, blacksmiths who attended to sharpening drills, fixing and repairing tools, stablemen to care for and feed the horses used in hauling cars, must be excluded.

The men who "stripped" the quarry and cleaned it of the debris and refuse, preparatory to the men drilling the holes and loading them for the discharge and blast, were only employed in connection with the general plant and must likewise be excluded.

Yet all these have been imposed against THE SURETY.

None of this is labor in the prosecution of the work, or "labor used directly upon the work."

2. Transportation and carriage of the material at points distant from the place whereat "*the work is done*" is also excluded.

Tested by this, the work done at the quarry by the men who had charge of the derricks to load the stone on the tram cars, by the men who had charge of the tram cars, and by the men to take it from the cars and place the stone in the "vessels, scows or lighters" in which it is to be transported to and placed in the breakwater, fifty miles away, must be excluded.

None of this is labor in the prosecution of the work or "labor used directly upon the public work."

What discrimination, differentiation or apportionment can be made between that portion of the labor which secures stone of the size which finally

becomes part of the breakwater and that which is the refuse or grout of the quarry?

Clearly "this is not labor directly employed" in the prosecution of the work, "nor labor done directly upon the work," but *it is* labor in producing the material that is to be "supplied" in the prosecution of the work.

In UNITED STATES v. FIDELITY AND DEPOSIT COMPANY OF MARYLAND (86 App. Div. [New York], 475, at page 478), WOODWARD, *J.*, says:

> "The mode in which one party to a bargain shall enable himself to do what he has agreed to do is no concern of the other party, and is no part of the contract (*Bacon* v. *Parker*, 137 Mass., 309, 311; *Pratt* v. *American Bell Telephone Co.*, 141 *id.*, 225, 229), with the modification above suggested, and which is provided by the statute, that the mode shall not be such as to leave obligations against the structure when completed.
>
> The full purpose of the statute has been served, it seems to us, when the surety has complied with its plain provisions, as they would be read and understood by the average man, and this would not reach beyond an obligation to see to it that the materials used in the structure under contract had been paid for; that the claims of the material men had been liquidated, and the wages of laborers actually employed upon the work, in fitting materials to be used in the structure, or performing labor in and about the premises, had been paid (see *Daley* v. *Legate*, 169 Mass., 257-260, and authorities there cited). In other words, the contract of the surety is that the contractor will not only build the structure, but that he will pay for the labor and materials used, which would constitute under statutes in most of the States, if unpaid, a lien upon

> the premises, and his obligation does not extend beyond the obligation which the contractor assumes in respect to these matters."
>
> See KENNEDY v. COMMONWEALTH, 182 Mass., 480.

In PHILADELPHIA v. MALONE (214 Penn. St. Rep., 90, at page 93), THE COURT says:

> "It seems to us that the Federal decisions have reason and justice to sustain them. *To hold with the plaintiff in this case is to require us to extend the bond to cover practically everything purchased by every subcontractor on the work.* If coal can be recovered for, then, of course, oil, waste, repairs, or tools used in running the derrick and locomotive or about the cars, or repairing them, would have to be recovered for, and, going a step further, light furnished if the work was prosecuted at night. *If coal for an engine can be recovered for, why not feed for horses, a farrier's bill or the bill of veterinarian?*
>
> *The test, it seems to us, is that upon which the Federal Courts have rested their decisions, the materials or labor must be such as the contract covers."*

Illustrations of the strictness with which the Courts enforce the rule that mechanics' liens can be sustained only for materials that actually go into the work and labor performed at the place will be found in

> CITY TRUST CO. v. UNITED STATES, 147 Fed. Rep., 155.
>
> SCHAGHTICOKE POWDER CO. v. GREENWICH & J. RY. CO., 183 New York, 306.
>
> TROY PUBLIC WORKS CO. v. CITY OF YONKERS, 207 New York, 81.

In HAYNES v. HOLLAND (48 South Western Rep., 400, not reported in official State Reports; Court of Chancery Appeals of Tennessee, September 3rd, 1898), the Court held that:

Laborers engaged in the regular business of making brick out of material furnished by their employer are not entitled to a lien on a house, for which their employer furnished and delivered the brick, for their wages which accrued during the furnishing of such brick, within Shannon's Code, Section 3540, providing that every journeyman or other person employed by a contractor to work on a building, "or to furnish material for the same," shall have a lien therefor.

SECOND.

No assignment of the wages to be thereafter earned was proven sufficient to sustain a recovery in an action at law, but the transaction at most only constituted an equitable assignment, enforcible only in equity, and cognizable at law only after it had been legally completed or established.

The following principles of procedure and law are invoked to sustain this point:

1. An equitable title is insufficient in the Federal Courts to sustain an averment of legal title alleged in an action at law, and required to sustain judgment therein.

In RIDINGS v. JOHNSON (128 U. S., 212), Mr. Justice BRADLEY, at page 217, says:

> "Thus, an equitable title, or an equitable defense, though allowed to be set up in a

State Court, cannot be set up in an action at law in the same State in the Federal Courts, but must be made the subject of a suit in equity. *Fenn* v. *Holme*, 62 U. S., 481; *Hurt* v. *Hollingsworth*, 100 U. S., 100. We have distinctly held that the equity jurisdiction and remedies conferred by the laws of the United States upon its Courts cannot be limited or restrained by State legislation, and are uniform throughout the different States of the Union. *Payne* v. *Hook*, 74 U. S., 425."

PACIFIC MUT. LIFE INS. CO. v. WEBB, 157 Fed. Rep., 155, 159.

LEVI v. MATHEWS, 145 Fed. Rep., 152, 154.

2. An assignment at law must be of a perfect and choate cause of action and not predicated upon that which is to be earned *in futuro* and to accrue upon the performance of acts subsequent to the promise to assign.

In MATTER OF BLACK (138 App. Div. [New York], 562, at pages 564 and 565), BURR, *J.*, says:

"An assignment of something which has no present, actual or even potential existence when the assignment is made, does not operate to transfer the legal title to that thing when it does come into existence (*Field* v. *Mayor, etc.*, 6 N. Y., 186; *McCaffrey* v. *Woodin*, 65 *id.*, 459). Such an instrument, if made in good faith for a valuable consideration and not void as against public policy, operates as an executory contract to transfer such after-acquired property and creates an equitable lien thereon (*Wisner* v. *Ocumpaugh*, 71 N. Y., 113; *Coats* v. *Donnell*, 94 *id.*, 168; *Kribbs* v. *Alford*, 120 *id.*, 519; *Cooper* v. *Douglass*, 44 Barb., 409). But the legal title remains in the assignor (*Horey* v. *Elliott*, 118 N. Y., 124,

> 136), *and at law that title is not transferred until either the equitable lien is enforced by judicial decree or some new act intervenes by which the assignor puts the assignee in possession thereof* (*McCaffrey* v. *Woodin, supra*)."

3. The transaction constituted, at the most, only an equitable assignment of the laborers' wages which was only capable of being enforced in equity.

In HOVEY v. ELLIOTT (118 New York, 124, at page 136), BRADLEY, *J.*, says:

> "The contract upon which the plaintiffs relied for the lien was executory, and the effectual perfection of it was dependent upon performance upon their part, of that required of the plaintiffs, to entitle them to payment. In equity it had effect as a lien, dependent on such performance, upon the principle that what is agreed and ought to be done is regarded as done. And if anything was requisite to accomplish it, the Court could have directed specific performance of the contract (*Pomeroy Eq. Jur.*, Sect. 1237; *In re Howe*, 1 Paige, 125, 130; *Hale* v. *Omaha Nat. Bank*, 49 N. Y., 626; *McCaffrey* v. *Woodin*, 65 *id.*, 459; *Payne* v. *Wilson*, 74 *id.*, 348; *Seymour* v. *C. & N. F. R. R.*, 25 Barb., 284; *Mitchell* v. *Winslow*, 2 Story, 630; *Metcalfe* v. *Archbishop of York*, 1 Mylne & C., 547).
>
> "*The only means for the enforcement of the lien was in equity* (*Pinch* v. *Anthony*, 8 Allen, 536, 539; *Milliman* v. *Neher*, 20 Barb., 37)."

At page 143:

> "*When then did the right of action at law accrue to the plaintiffs against the defendants?* As before suggested, the lien upon which the plaintiffs relied existed in execu-

tory contract, and was cognizable in equity only, until it was perfected either by recognition or contract of McDonald, in terms making it so *in presenti* after performance by the plaintiff, or by decree to that effect.

"*It being a lien in equity, and subject to equitable cognizance only, it furnished no support to an action at law for affirmative relief until it was in some manner perfected or established* (*Field* v. *Mayor, etc.*, 6 N. Y., 179, 187; *Chase* v. *Peck*, 21 N. Y., 581; *Payne* v. *Wilson*, 74 N. Y., 348; *Otis* v. *Sill*, 8 Barb., 102)."

In UNION TRUST v. BULKELEY (150 Fed. Rep., 510, at page 544), THE COURT says:

"There is no way by which an open account can be physically delivered. *Preston Nat. Bank* v. *Geo. T. Smith Co.*, 84 Mich., 385-387; *Spring* v. *So. Carolina Ins. Co.*, 8 Wheat. 268; *McDonald* v. *Daskam*, 116 Fed., 280. The agreement of the parties transferred to petitioner the equitable title thereto. *That effect inheres in the term "equitable assignment"—'an assignment of that much of the debt which a court of equity will recognize and a court of law will not.' First Nat. Bank* v. *Coates* (C. C.), 8 Fed., 540-542; *Holmes* v. *Evans*, 129 N. Y., 140; 2 *Am. & Eng. Ency. Law* (2nd Ed.), 1010, title 'Assignments.'"

The question was raised in the Trial Court by the requests to instruct the jury (see "*Seventy-first*" and "*Seventy-second*" Assignments of Error, 251-2, *p.* 137; 178, *p.* 95), and exceptions taken to the charge (173, *p.* 92; 179-180, *pp.* 95-6; see "*Seventy-fourth*" and "*Seventy-fifth*" Assignments of Error, 253-4, *p.* 138).

THE EVIDENCE AS MATTER OF LAW IS INSUFFICIENT IN LAW TO PROVE AND ESTABLISH AN ASSIGNMENT OF THE WAGES ENFORCEABLE IN AN ACTION AT LAW.

The evidence on this subject is meager and short and can be arrayed from the Transcript of Record within brief limits.

Mr. Bartlett testified:

> "He went to the men whom he engaged and told them that the work was quarrying at Sachem's Head, Connecticut (52, *p.* 28; 71, *p.* 38); you get paid by the month, so much a day, we have a store, you can have provisions and it will be deducted from you at the end of every month (52, *p.* 28).
>
> At the end of the month the laborers would come and see if their account is all right—how much was charged against them on the commissary books" (55, *p.* 30), and the account would be made up and sent to Hughes Bros. & Bangs, who would deduct the amount "off of them" (56-7, *pp.* 30-1); that is, Mr. Bangs would take it out of the amounts due the laborers for wages each month (69, *p.* 37).
>
> "The men were to go to work at so much a day and all the supplies they needed could be bought at Bartlett's commissary and they would get a card which would enable them to buy whatever they wanted at the commissary, and that would be deducted from their wages and they would give authority to reduce it; send the bill to Hughes Bros. & Bangs and they would deduct it" (74-5, *pp.* 39-40).
>
> "*I told them the same about giving me authority to collect the wages—what wages they will get*" (76, *p.* 40).
>
> "He would take it out of the amount of the labor to pay me. At that time he left me to make the wages for the laborers. I should make the wages for the men whatever I thought they were worth" (69, *p.* 37).

By the Court.

"He said to employ laborers and he would reduce my board bill every month by the amount I paid, whatever it was. He would pay me the amount of the commissary each month" (69, *p.* 37).

Mr. Donovan testified (123, *pp.* 65-6):

"I told him it was all right, that we would let him run the commissary, and that he should furnish us each month a list of the men, the amounts of money their accounts amounted to at the store, *and that he would arrange to have the amount so assigned by the men* deducted from the payroll when it was sent in by our timekeeper, and that if any men bought more than their account showed, we would not be responsible" (123, *pp.* 65-6).

THIRD.

"The claim against *The Surety* was a fraud in law" because:

1. The demand upon *The Surety* was for a wilfully exaggerated and unconscionable amount which the creditor knew was not due when he made the demand.

2. The demand was inextricably confounded with items constituting the largest part thereof, not recoverable under the surety's undertaking.

The contractor's bond is a substitute under the Act of Congress for a mechanic's lien secured by a statute to laborers and materialmen.

TITLE G. & T. CO. v. PUGET SOUND ENGINE WORKS, 163 Fed. Rep., 168, at page 174, affirmed *sub. nom.*

TITLE G. & T. CO. v. CRANE CO., 219 U. S., 34.

UNITED STATES v. ANSONIA BRASS, ETC., CO., 218 U. S., 452, 471.

The reasons for requiring statutory security in cases of public edifices and works are apparent because the laborers and materialmen cannot acquire a lien on a public work, and its wisdom is strikingly shown by requiring security for breakwater work upon which any lien would be utterly unavailing.

The surety's bond is a substitute for the land and building upon which improvements have been made, and the surety's position is, in all respects, analogous to that of the owner of the land upon which a lien has been filed for unpaid wages or material.

See cases cited *ante*, pages 15-6.

In UNITED STATES v. FIDELITY AND DEPOSIT COMPANY (86 App. Div. [New York], 475, at pages 479-80), WOODWARD, *J.*, says:

> "* * * the scheme of the statute appears to have been to give materialmen and laborers a lien upon the contractor's bondsmen in the same way that under our State statutes liens are imposed upon the premises, and we find no instance in which it has been held that this lien extended to labor performed in transportation or to the instruments used in conveying the materials to the premises."

In KENNEDY v. COMMONWEALTH (182 Mass., 480, at pages 481-2), THE COURT says:

"The statute provides for cases 'when public buildings or other public works upon which liens might attach for labor or materials if they belonged to private persons, are about to be constructed or repaired for the Commonwealth by contract,' and requires security for payment 'for all labor performed or furnished and for all materials used in such construction or repair.'

We are of opinion that this statute gives security for payment for labor performed or furnished and for materials only when they are used in construction or repair in a way that would create a debt which might be a subject for a lien, under proper proceedings, if the structure belonged to a private person.

There is nothing to indicate that security was intended to be given for every kind of labor and all kinds of materials that incidentally promote the construction of a building when they do not enter into the construction."

The account of the work, labor and services furnished by Mr. Bartlett included all the men excepting three (139, *p.* 74), who worked in the quarry, and contained a statement of provisions, board, rent and money furnished the men (139, *p.* 74; 108, *p.* 57; 104-5, *pp.* 55-6).

I. IT IS ESTABLISHED LAW THAT A CLAIM OF LIEN FOR A WILFULLY EXAGGERATED AND UNCONSCIONABLE AMOUNT CANNOT BE ENFORCED AGAINST THE OWNER EVEN FOR THE ACTUAL AMOUNT THAT MAY BE DUE.

"It is a fraud in law and vitiates the entire lien."

LANE V. JONES, 79 Alabama, 156, at page 163.

CAMDEN IRON WORKS V. CAMDEN, 60 N. J. Eq., 211, 214.

UTHOFF V. GERHARD, 42 Mo. App., 256.

The surety (like the owner) cannot control, supervise or follow the dealings between the creditor and the contractor, and is exposed to their machinations in their endeavor to impose unjust demands.

In all the utterances of the courts and the fiats of the legislatures is found one insistent declaration that the demandant for a lien shall state a just and true claim over all offsets and make known to the owner every just credit.

This is but law and equity and is applicable for the relief of the surety.

Notwithstanding the fact that this action was commenced May 25, 1909, to recover $7,171.28 with interest from December 1st, 1903, aggregating $11,043.77 (7-8, *pp.* 4-5), it was proven and conceded (183, *p.* 98) that payments *made while the work progressed* had reduced the claim to $2,835.27 (207, *p.* 114; 151-4, *pp.* 80-1).

THE CLAIM MADE AGAINST THE SURETY IS SO GROSS, SO EXORBITANT AND SO UNCONSCIONABLE AS TO DEFEAT ANY AND ALL RIGHT OF RECOVERY.

Regardless of statute and without the necessity of contractual engagement, the law incorporates "good faith" in every undertaking and refuses to enforce any liability that violates this principle.

> INDUSTRIAL & GENERAL TRUST, LTD., v. TOD, 180 New York, 215, at pages 225, 226.

The liability of the surety and the owner of the land are precisely similar and their rights and remedies should be identical in principle, however they may differ in procedure.

The principles and rules of law which have been established in sustaining the liability of the owner of land for wages and materials inuring to his

benefit and equally protecting him from unjust and undue demands, should be extended to and include *The Surety,* whose obligation to answer a like liability is made and delivered pursuant to statutory requirements.

In AESCHLIMANN v. PRESBYTERIAN HOSPITAL (165 New York, 296, at page 302), THE COURT says:

> *"The question is now presented whether "the plaintiffs are entitled to recover, or whether their right to enforce their lien was forfeited by the wilfully and intentionally false statements contained in their notice as to the amount of their claim.*
>
> "The weight of authority in other Courts of this State and in the Courts of other commonwealths seems to be that where a claimant makes statements which are important and material, and they are wilfully and intentionally false, he cannot enforce his lien upon the property against which it is filed."
>
> "In the earlier cases in Massachusetts it was held that any error in the claim stated in the notice of lien destroyed the lien or the right to enforce it. (*Lynch* v. *Cronan*, 6 Gray, 531; *Truesdell* v. *Gay*, 13 Gray, 311.) These decisions led to subsequent legislation by which it was declared that any inaccuracy in the claim should not invalidate the lien unless the claimant intentionally and wilfully claimed more than was his due. (*Hubbard* v. *Brown*, 8 Allen, 590; *Jones* v. *Keen*, 115 Mass., 170.) The rule in Michigan is that where a claimant places upon a record in his notice of lien a statement which he knows to be incorrect, his lien is lost. (*Gibbs* v. *Hanchette*, 90 Mich., 657.) The Iowa Courts have held that where a lienor intentionally makes a statement in the notice of lien which is not just and true, he cannot enforce the lien. (*Stubbs* v. *C. C. S. & S. W.*

Ry. Co., 65 Iowa, 513.) There are many other cases where this principle has been asserted, among which are *Gaskell* v. *Beard* (58 Hun, 101); *McKinney* v. *White* (15 App Div., 423); *Mull* v. *Jones*, 45 N. Y. S. R., 643); *Brandt* v. *Verdon* (44 N. Y. S. R., 885); *Rose* v. *P. & B. Paper Works* (29 Conn., 256); *Uthoff* v. *Gerhard* (42 Mo. App., 256); *McPherson* v. *Walton* (42 N. J. Eq., 282.)"

(At page 304):

"We are, therefore, of the opinion, that the Trial Court, having found that the plaintiffs 'enormously exaggerated' their claim and intentionally and by pretense of a fictitious contract sought to enforce and establish a false and fabricated demand, was justified in holding that the plaintiffs had thereby forfeited their right to recover any judgment against the sureties upon the bond in question."

No more striking violation of this principle could be stated than that afforded by the case at bar.

Facts.

The contract was awarded and the bond given on February 18, 1903 (19, *p.* 11; 37, *p.* 21). The claimant's labor was begun in March, 1903 (188, *p.* 101), and concluded in November, 1903 (188-92, *pp.* 101-105).

The contract was completed on November 8, 1903, and the United States Government paid the balance and all retained percentages on December 22, 1903 (155, *p.* 83).

On May 25, 1909 (Summons, 3, *p.* 2), without any previous notice to or demand on *The Surety*, the creditor brought suit against *The Surety* for $7,171.28 with interest from December 1, 1903, balance due on the full sum of $10,000.44, on which

the creditor claimed that only $2,829.16 had been paid (Complaint, 5, *p.* 3; 8, *p.* 5; 57, *p.* 31).

Thus the creditor made his case and Mr. Donovan, the contractor, his employer, whom he produced as a witness, testified that there "*would be between $5,000 and $6,000 due him, maybe a great deal more than that*" (145, *p.* 77), but this witness was forced to admit that $7,947.29 had been paid, leaving only $2,153.15 for which any pretence of claim could be made (207-8, *pp.* 114-5).

It was conceded that "all payments made to Mr. Bartlett in 1903 and 1904 are to be credited to the defendant."

THE LEARNED TRIAL JUDGE ruled: "Both sides concede that" (183-4, *pp.* 98-9).

The conceded payments before November 1, 1905 (183-4, *pp.* 98-99), shown on the card ledger, amounted to $7,947.25 (Exhibits F, G and H, 207-8, *pp.* 114-115).

Thus demand and suit was brought against The Surety for three-fold more than the creditor was entitled to without any notice nearly seven years after the occurrence.

IN EQUITABLE SAVINGS AND LOAN ASS'N v. HEWITT (55 Oregon, 329, at pages 338 and 339), the Court says:

> "If, in filing such claim, he puts on record a statement of the account which he knows to be untrue, or which by the exercise of reasonable diligence he could have known to be untrue, he loses his lien (*Nicolai* v. *Van Fridagh*, 23 Or., 149; *Lewis* v. *Beeman*, 46 Or., 311). The receipt of payment is a fact which is particularly within the claimant's knowledge, and he is bound to state it truly. (*Lynch* v. *Cronan*, 6 Gray (Mass.), 531).
>
> "*There is no room here to entertain the*

supposition that the inaccuracy of the statement of account in the lien notice was the result of an honest difference of opinion as to the amount of the payment, such as appeared in the cases of Rowland v. *Harmon*, 24 Or., 529; *Cooper Mfg. Co.* v. *Delahunt*, 36 Or., 402.

"The statement of the account in the lien notice not being true, the lien did not attach."

II. WHERE THE ITEMS FOR WHICH A LIEN CAN BE CLAIMED ARE INEXTRICABLY BLENDED AND INTERMINGLED WITH ITEMS FOR WHICH NO RIGHT OF LIEN CAN BE URGED, THE ACTION CANNOT BE MAINTAINED.

In UNITED STATES v. CONKLING (135 Fed. Rep., 508, at page 512), TOWNSEND, *Circuit Judge*, says:

"The evidence leaves it very doubtful whether the plaintiff had in mind any claim of liability on this bond for any portion of the charter money. It is clear that the obligation of the surety could not be enlarged to cover the contractor's general liability under the charter, or a *pro rata* portion of such liability, and especially where no data are furnished for its determination. *Childs* v. *Anderson*, 128 Mass., 198; *Crawford* v. *Powell*, 101 Ind., 421; *Gorgas* v. *Douglas*, 6 Serg. & R. (Pa.), 512; *McClain* v. *Hutton*, 131 Cal., 132, 141; *United States ex rel. McAllister* v. *Fidelity & Deposit Company of Maryland, supra.*"

In SCHULENBURG *Co.* v. STRIMPLE (33 Mo. App., 154, at page 160) ROMBAUER, *P. J.*, says:

"This claim is based upon a misconception of the law. It is the inseparable blending of items, for which the law gives no lien because they are not lienable in their nature, with lienable items which defeats the

entire lien claim and not the blending of lienable items, some of which remain unproved or unproved to their full extent. That distinction is clearly drawn in *Johnson* v. *The Building Company*, 23 Mo., App. 549, 550, and reiterated in *Pullis* v. *Hoffman*, 28 Mo., App. 671."

MR. BARTLETT testified:

"There is no way that I can tell the Court "and jury how many days the first man, who "got check No. 1, stayed on the work, nor "can I tell what his name was and what he "said to me. I could not say whether the "man No. 1 was the same man who had check "No. 1 in June, July or September, 1903, be-"cause the check changes. If a man goes "away we would give the same check to an-other man; not the same month, but the "next month we used the same check again "(75, *p.* 40)."

"We made no difference in giving out num-bers between the man who repaired the der-ricks and the man who blasted or fired off the blast; there was no difference in my keeping a record; I treated them all alike, that is, the men who did repairs to the derrick, the man who mended tools and the man who drove horses all treated alike and given a number. I did not keep different accounts for them." (77, *p.* 41).

"I had somebody to take care of the horses. He had to feed and groom the horses. He was treated the same as the men on the scow; the same as any other laborer. The bill was collected the same way, and added up in the same way, and spent in the same way. There was no way I could tell the difference be-tween them except the wages. I did not present any different bill for them, the hoist-ing engineer or foreman, I put it right there in the book (78, *p.* 42).

FOURTH.

The creditor was guilty of such gross laches and delay in presenting his claim against *The Surety* that, followed by the withdrawal of retained percentages and the insolvency of the principal bars recovery.

The above question is presented by the evidence and the learned Trial Judge erred in withdrawing it from the jury (169, *pp.* 90-91; 250, *pp.* 136-137). "*Sixty-ninth*" Assignment of Error (250, *pp.* 136-7).

The evidence is:

Mr. BARTLETT testified (80, 81):

> "I have worked for government contractors "before. *I knew that government contrac-"tors have to give bond.* I knew that ever "since I have been in this business. I knew "it may be before I went with Hughes Broth-"ers & Bangs, *I knew that any person who "wants to get a contract from the govern-"ment must give a bond.* I knew that be-"fore I talked to Mr. Bangs about this con-"tract. Mr. Bangs was first behind in mak-"ing payments to me before this contract."
>
> BY THE COURT:
>
> "*He was first behind on this contract at the beginning of it, in March, April, May, June.*"
>
> BY MR. MYERS:
>
> "*He went on piling up. I kept on asking "him*" (80-1, *pp.* 42-3).

The contract between Mr. Bartlett and Hughes Bros. & Bangs was entered into in February or March, 1903 (64, *p.* 35). From the very outset the firm did not pay the laborers' wages to Mr. Bart-

lett and he suffered the indebtedness to increase (80, *pp.* 42-3).

The contract between Mr. Donovan and the United States was completed November 8, 1903, *and the last payment made by the Government of all retained percentages and the balance due under the contract amounting to $8,956.44 was made on December 22, 1903* (155, *pp.* 82-3).

Judgments were recovered against Hughes Bros. & Bangs and execution returned unsatisfied in *January, 1907, and thereafter* (152, *p.* 81).

And against the Federal Contracting Company which succeeded Hughes Bros. & Bangs in this business in 1903 (133-4, *pp.* 71-2), judgment for $17,314.79 was recovered in *May, 1908*, and execution thereon was returned unsatisfied (153, *pp.* 81-2).

And the Breakwater Construction and Engineering Company which succeeded the Federal Contracting Company (178, *p.* 95; 163, *p.* 87) was adjudicated a bankrupt on May 2, 1908 (153, *pp.* 81-2).

The learned Counsel on the trial conceded that the contractors and the successor corporation were both insolvent (167, *p.* 89).

Bartlett was paid from May 25, 1903, to October, 1905, divers in sums aggregating $7,947.29 (Exhibit F, 207-8), and during that time furnished supplies, etc., amounting to $11,440.56 (208, *p.* 115). (Complaint, 1; Exhibits 7, 8, 9, 10; fols. 193-6 *et seq.*, *pp.* 106-8).

No demand was ever made on *The Surety*, nor notice of any kind served upon it of the creditors' claim (80-1, *pp.* 42-3). *Suit on the claim was brought May 25th, 1909* (4, *p.* 3), *nearly seven years after the cause of action accrued, for five-fold more than was conclusively established to be due.*

In UNITED STATES F. & G. CO. v. UNITED STATES (191 U. S., 416, at page 426), MR. JUSTICE BROWN says:

> "The facts of this case do not call for an expression of opinion as to whether, if an unusual credit were given, and in the meantime the principal obligator had become insolvent, or the surety were otherwise damnified by the delay, it might not be exonerated, since neither of these contingencies supervened in this case, and we are remitted to the naked proposition whether the giving of a customary credit, with no evidence of loss thereby occasioned, is sufficient to discharge the surety."

In UNITED STATES v. AMERICAN BONDING AND TRUST CO. (89 Fed. Rep., 921, at pages 924-5) THE COURT says:

> "It would seem that there must be a reasonable limit put to the credit which the material man may give to the contractor without losing his right to look to the surety. *If the surety is kept in ignorance he is greatly damnified by a long credit extending beyond the time of payment by the Government. An important protection which the surety has is to intercept the payment about to be made by the Government.*
>
> "The law of suretyship forbids that there shall be such dealing between the debtor and creditor, of which the surety is kept in ignorance, as shall put the surety in a situation of peril. Looking to the opportunity for protecting himself which the surety has if the debt for materials is due when the final payment is made by the Government, it seems but reasonable that, if the material man designedly extends the payment beyond that time, he should be held to have released the surety, and to have elected to look solely to the debtor . . . ."

FIFTH.

The admissions and declarations of Hughes Bros. & Bangs, who were sub-contractors of the principal in the bond, were inadmissible and incompetent as against *The Surety*.

1 GREENLEAF EVIDENCE, Section 187 (16th ed. Note 1).
HATCH v. ELKINS, 65 New York, 489, 496.
RAE v. BEACH, 76 New York, 164, 168.
WHEELER v. STATE, 56 Tenn., 393.
WHITE v. BANK, 56 Tenn., 475.
BOCARD v. STATE, 79 Indiana, 270.
KNOTT v. PETERSON, 125 Iowa, 404, 407.
LEE v. BROWN, 21 Kansas, 458.
HOWE v. FARRINGTON, 16 Hun (New York), 591.
AYER v. GETTY, 46 Hun (New York), 287, 288.

The declarations or admissions were not supported by any proof, as to the identity or authority of the person making them, but were charged broadly to have been made by Hughes Brothers & Bangs, a co-partnership (120, *p.* 64).

The co-partnership of Hughes Bros. & Bangs was not privy to the Bond between the contractor and *The Surety* to which in fact it was a stranger with only a right of statutory recourse created by the Act of Congress.

The co-partnership had no contractual relation with *The Surety* nor was it attempted to show that it had any knowledge of the relations between the creditor and the principal in the Bond or his sub-contractors.

The attempt to support and the admission of the evidence by the LEARNED TRIAL COURT on the ground that it was "giving credit to the bonding company," is without force (96, *p.* 51).

The following are complained of as errors of the LEARNED TRIAL COURT (102, *p.* 54):

> "MR. MYERS: There is no time proved when the paper was delivered, or of the person who made it, or of the authority.
>
> "THE COURT: Yes, there is proof that it came from the firm, and the proof is that they returned corrections. The date of the instrument is presumptive evidence. I think it is *prima facie* proof of the account between them. I will take it.
>
> "Exception by defendant (102, *p.* 54).
>
> "Marked Exhibit 9 (102, *p.* 54).
>
> "Q. And that also contains the deductions.
>
> "Same objection, ruling and exception (98, *p.* 52).
>
> "A. Yes.
>
> "Q. And corrections made by Hughes Brothers & Bangs?
>
> "Same objection, ruling and exception (98, *p.* 52).
>
> "A. Yes.
>
> "MR. NORRIS: I will offer that in evidence.
>
> "Yellow Slip pinned to May account in Exhibit 'A' is marked 'Plffs. Ex. C., R. E. G.' by the Notary.
>
> "MR. MYERS: Objected to as not properly proven and not being sufficiently established by the evidence to have been made by any of the firm of Hughes Brothers & Bangs, or by any person authorized to make it (99, *p.* 53).
>
> "THE COURT: Then I will allow these slips. They are not precisely admissions, but they are the actual means by which the liability

was ascertainable. The creditor makes a claim against the principal and the principal makes certain corrections and says: 'No, you are wrong in that,' and they eventually agree on what the liability shall be. It is not evidence of the liability, but actually creates the liability. I think the actual obligation was created when they liquidated.

"MR. MYERS: I object. The ground of such a liability is not sustained by the Act of Congress.

"Objection overruled. Exception by defendant (99, *pp.* 52, 53).

"MR. MYERS: There is no right to recover under this act by pleading accord and satisfaction; therefore the proof is incompetent. So far as it involves a right to bind the surety by admissions between the principal in the bond and the credit I object to it on that ground. I also object to it on the ground that the paper itself does not contain the statement or admission of the correctness of any account, and is in itself unintelligible and insufficient. And I also object on the ground that there is no proof in the case beyond this declaration of the witness, that he received it from Hughes Brothers & Bangs, as to the authenticity of the paper or the authority of the person who sent it.

"Objection overruled. Exception by defendant.

"MR. NORRIS: Under this ruling I can have the one attached to March and April also marked?

"THE COURT: Yes.

"Yellow slip marked Exhibit No. 7.

"MR. MYERS: I have excepted to your Honor's ruling.

"THE COURT: Take an objection and exception to all these things that were returned from Hughes Brothers & Bangs. The correction slips are all subject to your ob-

jection. The next one is for May. That will be Exhibit 8.

"Marked Exhibit 8" (98-100, *pp.* 52-3).

LASTLY.

It is respectfully submitted that the judgments should be reversed with costs to the plaintiff-in-error.

LEONIDAS DENNIS,
Attorney for United States
Fidelity and Guaranty Co.,
New York.

EMANUEL J. MYERS,
GORDON S. P. KLEEBERG,
Counsel.

APPENDIX.

Provisions of an Act of Congress, approved August 13, 1894 (28 Stat., 278, C. 280):

"An Act for the protection of persons furnishing materials and labor for the construction of public works.

"Be it enacted," etc., "that hereafter any person or persons entering into a formal contract with the United States for the construction of any public building or the prosecution and completion of any public work or for repairs upon any public building or public work, shall be required before commencing such work to execute the usual penal bond, with good and sufficient securities, with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract; and any person or persons making application therefor, and furnishing affidavit to the department under the direction of which said work is being or has been prosecuted, that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, shall be furnished with a certified copy of said contract and bond, upon which said person or persons supplying such labor and materials shall have a right of action and shall be authorized to bring suit in the name of the United States for his or their use and benefit against said contractor and sureties and to prosecute the same to final judgment and execution; provided, that such action and its prosecution shall involve the United States in no expense."

3

FILED.
OCT 24 1913
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

October Term, 1913, No. 50.

THE UNITED STATES FIDELITY & GUARANTY COMPANY,

Plaintiff-in-Error,

v.

THE UNITED STATES, for the Benefit of Frank P. Bartlett,

Defendant-in-Error.

Brief on Behalf of Defendant-in-Error.

EDWARD W. NORRIS,
Attorney for Defendant-in-Error.

EDWARD W. NORRIS,
HORACE L. CHEYNEY,
HENRY B. HAMMOND,
Counsel.

APPEAL PRINTING COMPANY, 32-34 VESEY STREET, NEW YORK.

SUPREME COURT OF THE UNITED STATES.

THE UNITED STATES FIDELITY & GUARANTY COMPANY,
Plaintiff-in-Error,

against

THE UNITED STATES for the benefit of Frank P. Bartlett,
Defendant-in-Error.

BRIEF ON BEHALF OF DEFENDANT-IN-ERROR.

Statement.

This action was commenced in the name of the United States, for the benefit of Frank P. Bartlett. The latter sues as assignee of the claims of a number of laborers, who were employed in connection with the construction of a breakwater for the U. S. Government, at Point Judith, Rhode Island. The suit is brought upon a bond, in the usual form, prescribed by the Act of Congress, given by John F. Donovan, the contractor, with the United States Fidelity & Guaranty Company, defendant, as surety; one of the conditions of the bond being that the contractor should make full payment to all persons supplying him with labor and materials in the prosecution of the work provided for in said contract.

The case was tried in the Circuit Court before Hand, J., and a jury. An examination of the record will disclose that all of the questions which are

now raised by the plaintiff-in-error were carefully considered by the Trial Judge and decided adversely to the plaintiff-in-error. A verdict was rendered for the plaintiff in the sum of $2,825.37.

The defendant sued out a writ of error to the Circuit Court of Appeals, for the Second Circuit, and filed eighty assignments of error.

All of the points which are now raised by the plaintiff-in-error were raised by it in the Circuit Court of Appeals, and all of them were unanimously decided adversely to the plaintiff-in-error, and a carefully considered opinion by Noyes, J., will be found in page 157 of the record.

This case raises no question of grave importance, nor of an unusual character, and does not differ from the ordinary case, except that it is alleged that the construction of an Act of Congress is involved and an appeal can therefore be taken to this Court.

The plaintiff-in-error raises only the same points which were decided against it by the Trial Court and by the unanimous vote of the Judges of the Circuit Court of Appeals, for the Second Circuit.

The Facts.

John F. Donovan was the confidential man of Hughes Brothers & Bangs, who were large contractors, and in 1903 he entered into a contract in his own name with the United States Government for the construction of a breakwater off Point Judith, Rhode Island. While Donovan was the nominal contractor, Hughes Brothers & Bangs were the real contractors and did all the work in the construction of the breakwater and received all the payments from the Government.

A bond was given to the Government by Donovan with the United States Fidelity & Guaranty Company, as surety, conditioned for the payment of all the labor and materials incurred in the prosecution of the work, provided for in the contract.

In the direct construction of the breakwater at sea but little labor was required, the stones being quarried on shore and transported by scows to the site of the breakwater and there dumped. In addition to this, the contractor was required to place certain facing stones in position at the breakwater. The contract was not merely for dumping the stones upon the site of the breakwater, but covered the quarrying of the stones, their transportation to the site of the breakwater and dumping at the latter place. In fact, the contract requires the contractor to specify the quarry from which the stones should be furnished, and to furnish a sample of the stone proposed to be furnished. The stones out of which this breakwater was constructed were quarried at Sachem's Head, some fifty or sixty miles from the site of the breakwater, and were transported to the latter place by scows.

Frank P. Bartlett, the defendant-in-error, with the consent of Hughes Brothers & Bangs, established a commissary or store at the quarry. Bartlett hired the men who were employed to work at the quarry, with the understanding with them that they should receive credit at his store from month to month, and that at the end of each month the amount due him by each laborer should be deducted from the laborer's wages by Hughes Brothers & Bangs and should be paid to Bartlett.

This agreement was carried into effect until the completion of the breakwater, and at the end of each month Bartlett and the laborers went over

their accounts and adjusted them. These accounts were then sent to Hughes Brothers & Bangs and the balance over the store account due to Bartlett was paid to each laborer, while the amount of the wages due to Bartlett under this arrangement was retained by Hughes Brothers & Bangs, and only a part has ever been paid to him. He therefore brought suit against the said Donovan and the United States Fidelity & Guaranty Company, as surety upon the contract, as assignee of these laborers to recover the amount of their wages as claimed.

POINT I.

The Surety Company is liable, under its bond, for the wages of the laborers who were employed in the quarry and in all other work necessary for the complete performance of the contract of Donovan with the Government.

The character and extent of the liability of sureties upon these bonds has been considered so frequently, that any discussion of the subject would be superfluous.

This Court has rendered several decisions relating to the character and extent of the surety's obligation upon these bonds, the following among others:

United States Fidelity & Guar. Co. v. *U. S.*, 191 U. S., 427.

Hill v. *American Surety Co.*, 200 U. S., 204.

Mankin v. *Ludorici-Celadon Co.*, 215 U. S., 533.

The case of *Hill* v. *American Surety Company*, *supra*, is especially instructive.

In that case two views were urged upon the Court, first, that the surety was liable only for labor and material furnished directly to the contractor, and second, that the surety was liable for all labor and material supplied in *the prosecution of the work*. The latter view was adopted by this Court.

One of the leading cases is *City Trust Company* v. *U. S.*, 147 Fed., 155, in which the opinion was delivered by Lacombe, J.

The statute under which the bond was given is susceptible of a more liberal construction than the State lien statutes.

> *American Surety Co.* v. *Lawrenceville Cement Co.*, 110 Fed., 719.
>
> *City Trust, Safe Deposit and Surety Co.* v. *U. S.*, 147 Fed., 155.

The rule of *strictissimi juris* does not apply to these bonds, when executed by a Surety Company, reciving a premium for underwriting the bond.

> *Guaranty Company* v. *Pressed Brick Company*, 191 U. S., 416.
>
> *Baglin* v. *Title G. & T. Co.*, 166 Fed., 356.
>
> *Atlantic Trust Co.* v. *Laurinburg*, 163 Fed., 695.

If we understand the position taken by the Surety Company, in the first point in its brief, it is as follows:

1st. The Surety Company is not liable under its bond for the cost of creating or producing the material used in the work (Brief, p. 11).

2nd. The surety is liable only for "labor used directly upon the work," *i. e.*, upon the breakwater itself (Brief, p. 13).

The first proposition, certainly, is not a tenable one. It is in direct contradiction of the terms of the bond and all the decisions upon the subject. Under the bond the Surety Company is liable for the cost of all "labor and materials" used in "*the prosecution of the work*" (*Hill* v. *American Surety Co., supra*).

It seems too clear for argument that the liability of the surety for the cost of materials used, necessarily includes all the items of expense incurred in the creation of that material.

For instance, suppose Hughes Brothers & Bangs had sublet the contract for furnishing the stone for this breakwater. Under this bond, the surety would be liable to the subcontractor for the contract price for the stone, and that price would include all the cost of producing the stone.

The second proposition of the surety company is that under the bond, it is liable only for wages for work done directly upon the breakwater.

If this proposition is sound, the liability of the surety was comparatively little, as the labor performed directly upon the breakwater consisted only in putting facing stones in place. All of the other stones were merely dumped at the places designated by the Government Inspectors.

The difference between the construction of a breakwater at sea, upon which practically no work can be done directly, and the construction of a building upon land, upon which the work can be directly done, is obvious.

The Surety Company had knowledge of the terms

of the contract and its liability must be determined by the terms of the contract.

The contract provided that the contractor should do three things:

1st. Furnish the stone for the construction of a rip-rap breakwater.

2nd. Deliver them at the breakwater.

3rd. Place them in position designated by the Government Inspector (see Record, p. 21).

This was the contractor's obligation to the Government. Now, what was the obligation of the surety? It was, amongst other things, "to make full payment to all persons supplying him (the contractor) with labor and materials *in the prosecution of the work*" (see Bond, p. 11).

Consequently the liability of the surety, was as follows, so far as concerns laborers' claims:

1st. For labor employed in the "prosecution of the work" of furnishing the stone.

2nd. For labor employed in the "prosecution of the work" of delivering the stone at the breakwater.

3rd. For labor employed in the prosecution of the work of placing the stones in position at the breakwater.

One illustration will suffice to show the fallacy of the contention of the surety company that it is liable only for work done directly upon the breakwater. Suppose this contract had called for the construction of a breakwater of concrete blocks. Under those circumstances, if the con-

tractor should go to the great expense of erecting a structure at the site of the breakwater, upon which to make the blocks, then according to this contention the Surety Company would be liable for the wages of the laborers employed in making the blocks. But on the other hand, if the blocks should be made on shore, a mile or two away and transported to the site of the breakwater, the surety would not be liable.

There does not appear to be any sound reason for such a distinction.

Every one connected with this transaction, including the surety, knew that but little work would be done directly upon the breakwater at sea. Every one, including the surety knew that the stone would have to be quarried ashore somewhere, and transported to the breakwater. The contract sets this forth fully. It requires the contractor to designate the quarry from which the stone was to be taken (p. 16, Record). It also contains full provisions as to the scows to be used in transporting the stone from the quarry to the breakwater (p. 18, Record).

Under the circumstances, the procuring of the stone elsewhere than at the breakwater, was necessarily a part of the work of constructing the breakwater, and these laborers, working at the quarry in getting out the stone, were employed in the prosecution of the work under the contract.

The contention of the plaintiff-in-error that the surety is liable only for labor performed directly upon the work, is based upon an expression to that effect in *U. S. v. Hyatt*, 92 Fed., 442.

That view has not been accepted in the later cases.

See *Guaranty and Trust Company* v. *Puget Sound Engine Works*, 163 Fed., 168, affd., 219 U. S., 24; where the surety was held liable for towage of materials, etc.

The true test, as laid down by this Court in *Hill* v. *American Surety Company*, 200 U. S., 197, is whether the labor was supplied in the *prosecution of the work*.

The argument of counsel for the plaintiff-in-error, seemed to admit that the Surety Company is liable for the wages of some of the laborers at the quarry, namely, those who actually produced the stones which went into the breakwater, but on the other hand, contends that the surety is not liable for the wages of the blacksmiths who sharpened the drills, the carpenters who made the necessary repairs to derricks, the men employed to drive the horses upon the tram upon which the stones were taken to the scows, etc.

The true rule in such cases is that laid down in *American Surety Co.* v. *Lawrenceville Cement Co.*, 110 Fed., 717, where the Court held the surety liable for sundry small repairs to the plant, incidental to the prosecution of the work, but disallowed claims for construction of dump cars, *which survived the work*.

This Court in *Title G. & T. Co.* v. *Crane*, 219 U. S., at page 34, follows this case and states as follows:

> "We agree with Judge Putnam in American Surety Co. *v.* Lawrenceville Cement Co., 110 Fed., 717, that in these small matters the objection if carried to an extreme, would defeat the purpose of the statute."

All the labor at the quarry, for which compensation is claimed, was incidental to and part of *the prosecution of the work* of furnishing the stones and the surety is therefore liable for it.

The Court is referred to the opinion of Noyes, J., in the Circuit Court of Appeals for a full and careful consideration of this point (p. 158, fol. 296).

POINT II.

The laborers made complete legal assignments of their wages claims to Bartlett.

The Surety Company in its second point contends that these laborers made equitable assignments only, which can not be enforced in an action at law.

If there had been no more than the agreement made at the time these laborers were employed, there might be some force in this contention, as that might be construed as an agreement to assign only.

The law is clearly stated in the *Matter of Black*, 138 App. Div., 562, cited in the Surety Company's brief (p. 17).

Burr, J., says in concluding portion of the extract cited as follows:

> "At law that title is not transferred until either the equitable lien is enforced by judicial decree or *some new act intervenes by which the assignor puts the assignee in possession thereof.*"

In this case there was such "new act." At the end of each month, the laborers went over their accounts with Bartlett, he then sent a statement of

the account of each laborer to Hughes Brothers & Bangs; the amount due to Bartlett by each laborer was deducted from his wages and Hughes Brothers & Bangs credited Bartlett with the total amount due him by the laborers. These were completed legal assignments and were so treated by every one.

The Surety Company alone questions them.

Noyes, J., in the opinion of the Circuit Court of Appeals, considers this question fully, at page 159.

POINT III.

Bartlett was not guilty of fraud upon the Surety Company by bringing suit for more than was found by the jury to be due to him.

The answer does not set up this defence, which is raised in the third point of the brief of the plaintiff-in-error.

As there was no issue on this point the evidence was not directed to it, but the plaintiff-in-error now attempts to raise it, in the absence of any issue, and upon evidence which is not complete and which was not admitted upon this point, but upon others.

Admitting that the facts stated in the brief of the Surety Company are all the pertinent facts bearing upon this question, which is denied, no reason has been shown for a reversal of the judgment. No damage has been done to surety. It cannot and does not question that there was due to Bartlett the amount of the judgment.

The Courts have not declared, as yet, if a plaintiff brings suit for more than is due to him, that he is guilty of fraud and can recover nothing.

The cases of liens, cited in the third point of the brief of the Surety Company do not apply, as they were all based upon wilful and intentional false statements. Where there has been an honest mistake it will not invalidate the lien.

> Pioneer Mining Co. *v.* Delamotte, 185 Fed., 752.
> Schmulbach *v.* Caldwell, 196 Fed., 16-28.
> Ringle *v.* Wallace, 149 N. Y., 439.

As this question has been raised, however, the full facts to this claim should be stated.

Bartlett left his books in a building at the quarry, and that building, together with his books, was destroyed by Hughes Brothers & Bangs (Rec., p. 44).

The only existing account then was that in the books of Hughes Brothers & Bangs. Bartlett was always willing to accept their account, but their books had passed into the possession of the Breakwater Construction and Engineering Company, and as will be shown, he met with no success in getting any information from it as to the contents of the books.

His only method of ascertaining the payments made to him, was such as he could identify in his bank books. This was necessarily an incomplete method, as during some of the time, Hughes Brother & Bangs, were making payments to him on another account and he was also depositing moneys received from other sources.

Bartlett was anxious to present a proper claim.

In order that no improper claim should be made, the deposition of Mr. Geary, the Treasurer of the Breakwater Company, was taken at Cleveland, Ohio, but he was unable to find the card from the

ledger of Hughes Brothers & Bangs containing the Bartlett account (p. 63).

Notice was given to the Surety Company to produce the card from the ledger of Hughes Brothers & Bangs containing the Bartlett account and at trial E. J. Myers, Esq., *counsel for the Surety Company, denied having that account* (p. 69).

> "Mr. Norris: Mr. Myers, have you any of the bills which were sent by Bartlett to Hughes Brothers & Bangs?
>
> "Mr. Myers: We have no such bills; never had any such bills.
>
> "Mr. Norris: Have you any books or any card ledgers?
>
> "Mr. Myers: *We have not any thing.*
>
> "Mr. Norris: The plaintiff offers in evidence the notice to produce with admission of service" (p. 69).

Notwithstanding that denial, a short time later, counsel produced the account when he desired to cross examine the witness Donovan in respect to it (p. 82). This account card was in possession of counsel for Surety Company as early as May 11th (p. 85). The account was accepted by the plaintiff (p. 90) and the verdict was for the amount of it.

The opinion of Noyes, J., in the Circuit Court of Appeals, fully considers this point.

POINT IV.

Bartlett was not guilty of laches in failing to bring suit against the Surety Company at an earlier date.

As Judge Noyes points out in his opinion in the Circuit Court of Appeals, this defence is not available in an action at law.

Assuming that which is denied, that the creditor may lose his claim by laches, before it is barred by the Statute of Limitations, the defendant did not attempt to make out a case. It merely proved that Hughes Brothers & Bangs were insolvent. It did not attempt to prove, that at the time the bond was signed or subsequently *that no indemnity was given to it*, as is usual in such cases, and when counsel for plaintiff attempted to put in evidence the indemnity agreement given to the Surety Company, its counsel objected to its admission and it was excluded (p. 89).

It is clearly insufficient in such a case to merely prove the insolvency of the contractor in order to relieve the surety.

It may be that notwithstanding such insolvency, the Surety Company is fully indemnified.

POINT V.

The Court below did not err in admitting in evidence Plaintiff's Exhibits 7-11.

The Surety Company in its fourth point contends that these exhibits should not have been admitted.

At the end of each month Bartlett sent to Hughes Brothers & Bangs, a statement of the amounts due him by the laborers. Some times these amounts exceeded the amounts due the laborers for wages. Hughes Brothers & Bangs returned these statements to Bartlett showing how much they had deducted from the amount of the statement. These are the exhibits which are objected to.

No reasons are given in the brief why these statements were not admissible. Their admission

did not prejudice the surety but benefited it, by reducing the amount of the plaintiff's claim.

Furthermore, after the admission of the card account from the books of Hughes Brothers & Bangs, those exhibits played no part in the case and they then became of no importance.

POINT VI.

Plaintiff-in-error should be adjudged to pay defendant-in-error 10 per cent. damages, as this writ of error was taken out for the purpose of delay.

We submit that this is a case which fairly calls for the imposition of a penalty on the ground that the appeal was taken for delay.

The record in this case was filed in this Court on July 3rd, 1911. The writ of error was taken out in the face of unanimous opinion of the Circuit Court of Appeals. The case involves nothing new or of importance. The law as to the liability under these bonds is fully settled by numerous decisions of this and other Courts.

The plaintiff-in-error seems to be an old offender in this particular, and the Court of Appeals of New York, in the recent case of Brandly *v.* The United States Fidelity & Guaranty Co., 203 N. Y., 599, assessed 10 per cent. damages for their delay under Subdivision 5 of Section 3251 of the Code of Civil Procedure of the State of New York.

Defendant-in-error respectfully urges that this Court will impose a penalty of ten per cent. damages, in addition to the interest, under Subdivision 2 of Rule 23 of the Supreme Court of the United States.

POINT VII.

It is submitted that the judgment of the Court below should be affirmed.

EDWARD W. NORRIS,
Attorney for Defendant-in-Error.

EDWARD W. NORRIS,
HORACE L. CHEYNEY,
HENRY B. HAMMOND,
Counsel.

4

FILED
OCT 31 1913
Clerk

Supreme Court of the United States

OCTOBER TERM, 1913.

No. 50.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY,

Plaintiff in error,

vs.

THE UNITED STATES, FOR THE BENEFIT OF FRANK F. BARTLETT,

Defendant in error.

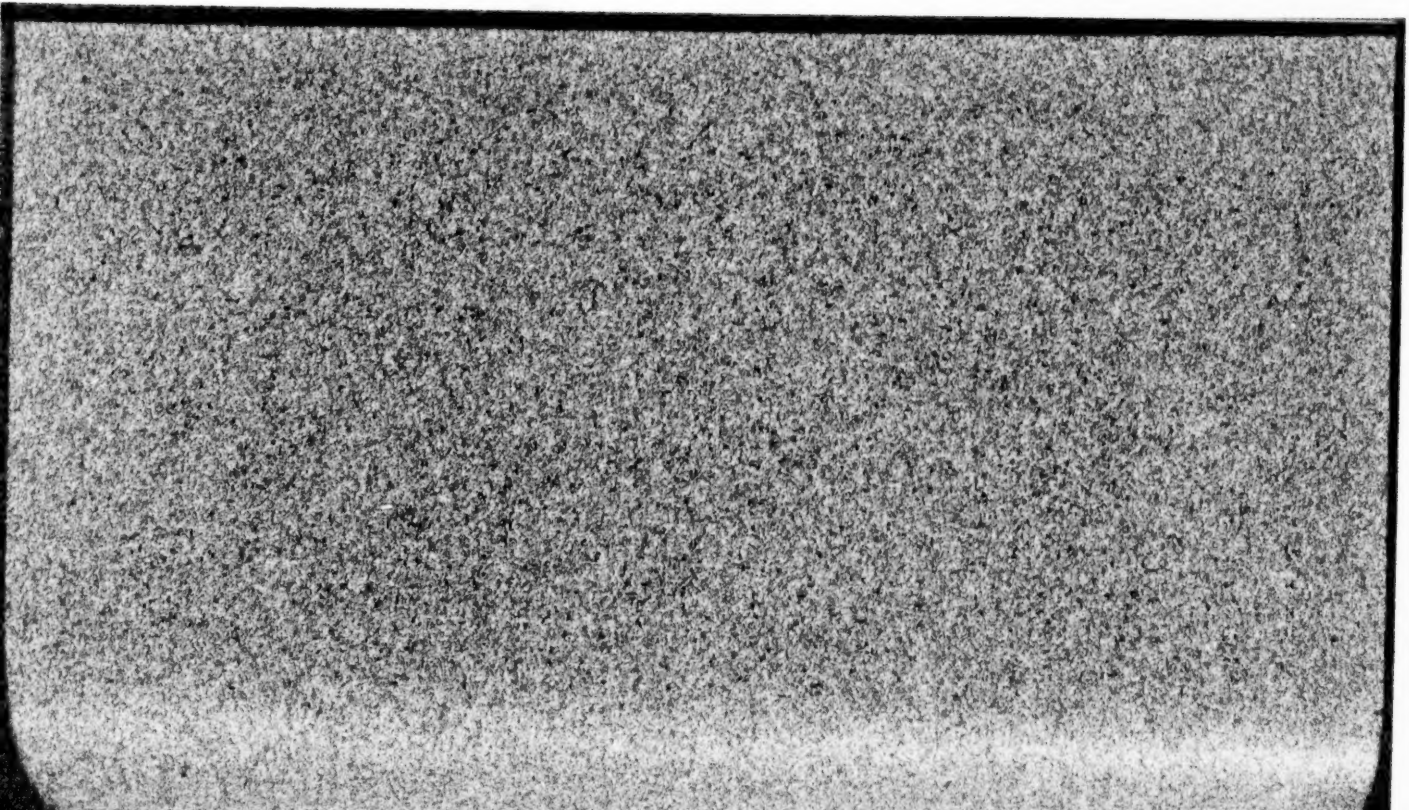
IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLYING BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

LEONIDAS DEMUS,
Attorney for the United States Fidelity and Guaranty Company,
New York.

EMANUEL J. MYERS,
GORDON S. P. KNOWLES,
Counsel.

The Knickerbocker Press, Williamsport, N. Y.



INDEX.

PAGE

1. Points 1

FIRST (*Replying to defendant-in-error's "Point III"*): The cause presented by the defendant-in-error is not only inconsistent with good faith, but brings the cause within the principle:

"That the claim was so grossly and wilfully exaggerated as to leave no other inference than that it was fraudulently done" 1

SECOND (*Replying to defendant-in-error's "Point III"*): The question of laches was raised by the pleadings and upon the trial and ruled upon by the learned District Judge and the Circuit Court of Appeals..... 6

THIRD (*Replying to defendant-in-error's "Point VI"*): The application to this Court for damages under Subdivision 2 of Rule 23 should be refused 7

INDEX OF AUTHORITIES.

Bohn Mfg. Co. v. *Keenan*, 15 South Dakota, 377.. 3

Gibbs v. *Hanchette*, 90 Michigan, 657..... 5

Grerlick Co. v. *Taylor*, 113 Michigan, 704..... 2

Griff v. *Clark*, 155 Michigan, 611..... 2

Jones v. *Keen*, 115 Massachusetts, 170..... 2, 5

Lynch v. *Cronan*, 6 Gray (72 Massachusetts), 531.. 2, 5

McPherson v. *Walton*, 42 New Jersey Equity, 282. 2, 5

Marsh v. *Mick*, 159 Illinois Appeals, 399, 407..... 2

Nicholai v. *Van Fridagh*, 23 Oregon, 149..... 3

Reeve v. *Elmendorf*, 38 New Jersey Law, 125.... 2

Robinson v. *Brooks*, 31 Washington, 60..... 3

Romanik v. *Rapoport*, 148 Appellate Division (N. Y.), 688, 691, 692..... 3

Springer Land Assoc. v. *Ford*, 168 United States, 513 2

State ex rel. Connors v. *Shelton*, 238 Missouri, 281, 291, 292 2

Stubbs v. *Clarinda College Springs*, 62 Iowa, 280.. 2

Stubbs v. *Clarinda College Springs*, 65 Iowa, 513.. 2

IN THE

Supreme Court of the United States

No. 50, October Term, 1913.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
Plaintiff-in-error,

versus

THE UNITED STATES, FOR THE BENEFIT OF FRANK P. BARTLETT,
Defendant-in-error.

REPLYING BRIEF IN BEHALF OF PLAINTIFF-IN-ERROR.

POINTS.

FIRST.

(*Replying to defendant-in-error's "Point III."*)

The cause presented by the defendant-in-error is not only inconsistent with good faith, but brings the cause within the principle—

"That the claim was so grossly and wilfully exaggerated as to leave no other inference than that it was fraudulently done."

That the right of the material man or laborer to recover under the Act of Congress is analogous to the rights secured by the common statutory Mechanic's Lien was expressly recognized by this Court in U. S. (Hill case) v. AMERICAN SURETY Co., 200 U. S., 197, at page 203.

The learned counsel for the defendant, however, contends (*vide*, page 11):

> "The courts have not declared, as yet, if a plaintiff brings suit for more than is due him, that he is guilty of fraud and can recover nothing."

This broad assertion is opposed to the entire current of American adjudications.

SPRINGER LAND ASSOC. v. FORD, 168 United States, 513.

MARSH v. MICK, 159 Illinois Appeals, 399, 407.

STUBBS v. CLARINDA COLLEGE SPRINGS, 62 Iowa, 280.

STUBBS v. CLARINDA COLLEGE SPRINGS, 65 Iowa, 513.

GREELICK CO. v. TAYLOR, 143 Michigan, 704.

GRIFF v. CLARK, 155 Michigan, 611.

STATE *ex rel.* CONNORS v. SHELTON, 234 Missouri Rep., 281, 291, 292.

LYNCH v. CRONAN, 6 Gray (72 Massachusetts), 53.

JONES v. KEEN, 115 Massachusetts, 171

McPHERSON v. WALTON, 42 New Jersey Equity, 282.

REEVE v. ELMENDORF, 38 New Jersey Law, 125.

ROMANIK v. RAPOPORT, 148 Appellate Division, New York, 688, 691, 692 (1912, latest New York decision).

NICHOLAI v. VANFRIDAGH, 23 Oregon, 149.

BOHN MFG. CO. v. KEENAN, 15 South Dakota, 377.

ROBINSON v. BROOKS, 31 Washington, 60.

It is contended, however, by the learned counsel for the defendant-in-error that Bartlett was unable to present a more accurate claim against THE SURETY because his books had been destroyed without his fault, but through the fault of Hughes Brothers & Bangs (*vide*, Brief, page 12).

The contractor had in his possession and produced the book of original entries on the trial to prove the exact amount claimed by him in his pleading, and testified to by him and his bookkeeper, viz.:

1. The number of men employed in the quarry and on the breakwater.

2. The period of the employment and the number of days each man worked.

3. The amount in value of the board and the supplies furnished to each man by Bartlett.

This book was *not* left at the quarry *and* "*destroyed* by Hughes Brothers & Bangs," and that statement is so inconsistent with any repayment that it falsifies the assertion of the creditor's counsel that

> "The only existing account then was that in the books of Hughes Bros. & Bangs" (*vide*, page 12).

Bartlett likewise admitted that he had his books which showed *all* the moneys received by him in 1903, 1904, 1905 and 1906 (Transcript, page 32, fol. 59), and that all he had received from Hughes Bros. & Bangs was $2,829.16, leaving a balance due him of $7,171.28 with interest from December, 1903, making his claim which he demanded at the trial of over $10,000 (Complaint, pages 4-5).

So that as to the amount claimed from Hughes Bros. & Bangs and sought to be recovered from the Surety, there was no inability to furnish the utmost detail.

Bartlett also produced at the trial the original slips of Hughes Bros. & Bangs in Donovan's handwriting, containing the correction of his account and the deductions made therefrom by Hughes Bros. & Bangs (Transcript, page 68, fol. 127).

And so with Donovan, the principal contractor, ready and able to testify to every single bill of Bartlett (Transcript, page 74, fol. 139), that there was due to Bartlett over $6,000 (Transcript, page 77, fol. 145); and Bartlett swearing that $7,171.28 with interest, amounting to upwards of $10,000, was due him (*vide*, Complaint, page 5, fol. 7), it is seriously urged by the learned counsel that

> "BARTLETT *was anxious to present a proper claim*" (*vide*, Brief, page 121).

It does not even possess the merit of novelty for a claimant-creditor to demand as against the Surety nearly seven years after the close of the transaction, and as presented by his counsel, that

> "His only method of ascertaining the payment made to him was such as he could identify in his *bank books*" (*vide*, defendant's counsel's Brief, page 12).

Both at law and in equity a claimant will not be heard to allege that he was ignorant of payments made to him, unless the burden of proof cast upon him of establishing such ignorance is fairly met.

LYNCH v. CRONAN, 6 Gray (72 Massachusetts), 531.

MCPHERSON v. WALTON, 42 New Jersey Equity, 282.

GIBBS v. HANCHETTE, 90 Michigan, 657.

JONES v. KEEN, 115 Massachusetts, 170.

So likewise upon such a condition in warning the Surety and showing the claim that was advanced against it, complaint is made that the only evidence in the Surety's possession to defeat the claim was not shown to the claimant, contractor and his astute counsel (*vide*, page 5, fols. 12-13).

The Surety's safety lay in keeping this evidence from being destroyed, until it was seen to what lengths Donovan and Bartlett would go on the trial when they thought they had the Surety at their mercy.

That it was known to the other side cannot be controverted, because it was verified by one of the witnesses for the defendant-in-error before the trial (Transcript, page 85, fols. 159-160).

And so at the proper time and at the *crux* of the trial—*i. e.*, on the cross-examination of Donovan, *contractor*, *manager* and confidential man for Hughes Bros. & Bangs and witness for Bartlett—the ledger cards in the handwriting of Donovan were thrust in his face, and he was forced to recant and destroy the creditor's claim so as to leave no doubt in the language of the books "*that the claim had been wilfully exaggerated.*"

Bartlett's bookkeeper, Toffi, was examined in Boston several months prior to the trial before there was any contention raised that the Surety had possession of these cards upon which the entries or payments were in Donovan's (the contractor's) handwriting.

And the amount of work done was likewise in Donovan's handwriting, corresponding to the book of laborers' wages produced by Bartlett and which had escaped destruction by fire and the clutches of the Surety.

SECOND.

(Replying to defendant-in-error's "Point IV.")

The question of laches was raised by the pleadings and upon the trial and ruled upon by the learned District Judge and the Circuit Court of Appeals.

The transcript shows allegations, evidence and rulings of the courts (*vide*, page 90, fol. 169; page 160, fol. 298; Answer, pages 6-8, par. Fifth, fol. 14).

It is true that MR. JUDGE HAND in the District Court and MR. JUDGE NOYES in the Circuit Court of Appeals held the defense insufficient and inapplicable at law, but the reasons to disagree as well as to appeal therefrom are, it is respectfully submitted, fully set forth in the FOURTH POINT at page 30 of our principal Brief.

IT CERTAINLY DOES NOT COMMEND ITSELF, EVEN IF IT BE NOT REPREHENSIBLE, FOR COUNSEL TO MAKE CONTENTIONS BASED UPON CONJECTURE ON EVIDENCE EXCLUDED IN THE TRIAL FORUM.

The learned counsel contends (*vide*, page 14):

> "*It may be that notwithstanding such insolvency the Surety Co. is fully indemnified*," and that the Surety Co. "did not attempt to prove that at the time the bond was signed or subsequently *that no indemnity was given to it*, as is usual in such cases" (*vide*, page 14).

The LEARNED DISTRICT JUDGE excluded the offer of the defendant-in-error to prove such an agreement (Transcript, page 89, fol. 169).

What consideration can an Appellate Court of last resort give to such innuendo—for it is not possible that probability and possibility will be considered in or presumption indulged to assist the debator of what is "*usual in such cases.*"

THIRD.

(*Replying to defendant-in-error's "Point VI."*)

The application to this Court for damages under Subdivision 2 of Rule 23 should be refused.

WE KNOW OF NO FACT BEFORE THIS COURT WHICH AFFORDS ANY JUSTIFICATION FOR THE LEARNED COUNSEL'S STATEMENT:

> "*The plaintiff-in-error seems to be an old offender in this particular.*"

Certainly questions are presented which are of far-reaching importance, but which have not been yet adjudicated in this Court, so far as our search has disclosed to us.

The case cited in 203 New York, 599, discloses no reason for the action of the Court thereon taken, but, however thereon justified as to which the report in that case affords no basis beyond inference, the writ of error herein sued out, it is submitted, is sued out in good faith, and it is respectfully submitted, well founded.

Respectfully submitted,

LEONIDAS DENNIS,
Attorney for Plaintiff-in-error,
New York City.

EMANUEL J. MYERS,
GORDON S. P. KLEEBERG,
Counsel.

disclose an attempt to recover more than the amount actually due.

A claimant will not be charged with laches when the record does not disclose any delay which affected the relations of the parties or such that should relieve a surety from liability on the contractor's bond.

189 Fed. Rep. 339, affirmed.

THE United States, for the benefit of Frank P. Bartlett, brought suit in the Circuit Court of the United States for the Southern District of New York against the plaintiff in error as surety upon a bond given pursuant to the provisions of an act of Congress (August 13, 1894, c. 280, 28 Stat. 278) to the effect that any person or persons contracting with the Government for the prosecution of public work should be required to furnish a bond conditioned that the contractor or contractors would "promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract." Upon trial a verdict was rendered in his favor, and judgment entered accordingly. The Circuit Court of Appeals for the Second Circuit affirmed the judgment (189 Fed. Rep. 339), and this writ of error is brought to review its judgment.

The record shows: The United States Government contracted with one Donovan on February 18, 1903, for the construction of a breakwater off Point Judith, Rhode Island, it being provided in the contract that he should be "responsible for and pay all liabilities incurred in the prosecution of the work for labor and material." Donovan executed a bond containing the obligation required by the act, with the plaintiff in error as surety. Donovan was associated with Hughes Brothers & Bangs and it was agreed that they should perform the contract and that he would turn over the Government's estimates to them, this fact being known to the plaintiff in error.

An arrangement was made between Hughes Brothers &

Bangs and Bartlett that he should engage the labor, open the quarry of the former, located at Sachems Head, Connecticut, about fifty miles from the breakwater, and superintend the furnishing of stone for the construction of the breakwater. Bartlett was also to maintain a commissary at the quarry from which the men might be supplied with provisions and merchandise, an account to be kept of the articles purchased, and, after approval by the men, forwarded to the office of Hughes Brothers & Bangs, who would deduct the amount from the wages of the laborers, this practice being with their consent, and credit Bartlett's account.

The quarry was operated, labor being employed in various ways from clearing the surface preparatory to blasting to loading the stone on scows, and the stone was transported to the breakwater and there deposited according to the direction of a Government inspector. All, save the inspector and a few of the more skilled workmen, were provided for at the commissary, and, under the arrangement described, the amount of their purchases was deducted from their wages by Hughes Brothers & Bangs. Separate account was kept of the men who were actually employed at the breakwater, for the reason that Bartlett had to wait for them to come back to procure their approval of his charges, before he could send in his statement to Hughes Brothers & Bangs.

The contract was completed November 8, 1903, and on December 22, 1903, the last retained percentage of $8,956.44 was paid by the United States. Hughes Brothers & Bangs became insolvent in 1907 or 1908. Suit on the bond was begun June 4, 1909.

Mr. E. J. Myers, with whom *Mr. Leonidas Dennis* and *Mr. Gordon S. P. Kleeberg* were on the brief, for plaintiff in error:

Neither the act of Congress nor the terms of the bond

warrant a recovery for preparation for the performance of the contract. *City Trust Co.* v. *United States*, 147 Fed. Rep. 155; *United States* v. *Hyatt*, 92 Fed. Rep. 442; *United States* v. *Morgan*, 111 Fed. Rep. 474; *United States* v. *Kimpland*, 93 Fed. Rep. 403.

Instrumentalities and plant (i. e., cost of) capable of general use by the contractor cannot be recovered in this action.

Transportation and carriage of the material at points distant from the place whereat the work is done is also excluded. *United States* v. *Fidelity & Deposit Co.*, 86 App. Div. (N. Y.) 475; *Kennedy* v. *Commonwealth*, 182 Massachusetts, 480; *Philadelphia* v. *Malone*, 214 Pa. St. 90, 95.

As to the strictness of the rule that mechanics' liens can be sustained only for materials that actually go into the work and labor performed at the place, see *City Trust Co.* v. *United States*, 147 Fed. Rep. 155; *Schaghticoke Powder Co.* v. *Greenwich Ry. Co.*, 183 N. Y. 306; *Troy Public Works Co.* v. *Yonkers*, 207 N. Y. 81; *Haynes* v. *Holland*, 48 S. W. Rep. 400.

No assignment of the wages to be thereafter earned was proven sufficient to sustain a recovery in an action at law, but the transaction at most only constituted an equitable assignment, enforcible only in equity, and cognizable at law only after it had been legally completed or established.

An equitable title is insufficient in the Federal courts to sustain an averment of legal title alleged in an action at law, and required to sustain judgment therein. *Ridings* v. *Johnson*, 128 U. S. 212, 217; *Pacific Mut. Ins. Co.* v. *Webb*, 157 Fed. Rep. 155; *Levi* v. *Mathews*, 145 Fed. Rep. 152.

An assignment at law must be of a perfect and choate cause of action and not predicated upon that which is to be earned *in futuro* and to accrue upon the performance of acts subsequent to the promise to assign. *Matter of Black*, 138 App. Div. (N. Y.) 562.

The transaction constituted, at the most, only an equitable assignment of the laborers' wages which was only capable of being enforced in equity. *Hovey* v. *Elliott*, 118 N. Y. 124; *Union Trust Co.* v. *Bulkeley*, 150 Fed. Rep. 510, 544.

The claim against the surety was a fraud in law because the demand upon the surety was for a willfully exaggerated and unconscionable amount which the creditor knew was not due when he made the demand.

The demand was inextricably confounded with items constituting the largest part thereof, not recoverable under the surety's undertaking. *Title G. & T. Co.* v. *Puget Sound Engine Works*, 163 Fed. Rep. 168, 174; *Title G. & T. Co.* v. *Crane Co.*, 219 U. S. 34; *United States* v. *Ansonia Brass Co.*, 218 U. S. 452, 471; *United States* v. *Fidelity & Deposit Co.*, 86 App. Div. (N. Y.) 475, 479; *Kennedy* v. *Commonwealth*, 182 Massachusetts, 480.

A claim of lien for a willfully exaggerated and unconscionable amount cannot be enforced against the owner even for the actual amount that may be due.

It is a fraud in law and vitiates the entire lien. *Lane* v. *Jones*, 79 Alabama, 156, 163. *Camden Iron Works* v. *Camden*, 60 N. J. Eq. 211, 214; *Uthoff* v. *Gerhard*, 42 Mo. App. 256.

The claim made against the surety is so gross, so exorbitant and so unconscionable as to defeat any and all right of recovery.

Regardless of statute and without the necessity of contractual engagement, the law incorporates good faith in every undertaking and refuses to enforce any liability that violates this principle. *Industrial Trust, Ltd.*, v. *Tod*, 180 N. Y. 215, 225; *Aeschlimann* v. *Presbyterian Hospital*, 165 N. Y. 296, 302.

In this case demand and suit was brought against the surety for three-fold more than the creditor was entitled to without any notice nearly seven years after the occur-